Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court of appeals' remand, without *vacatur*, of Federal Communications Commission rules held to have been promulgated without statutory authority contravenes the Administrative Procedure Act and this Court's precedent constraining agency power to that delegated by Congress.

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

Core Communications, Inc. (CoreTel) is a closely held corporation organized under the laws of the District of Columbia. CoreTel has no parent companies, subsidiaries, or affiliates, and no publicly held company has an ownership interest in it. CoreTel participated in the proceedings below before the Federal Communications Commission (FCC) and was an intervenor in support of the petitioner in the court of appeals. WorldCom, Inc. was the petitioner. The FCC and the United States were respondents. Other intervenors in support of petitioners were: e.spire Communications, Inc., People of the State of New York, Time Warner Telecom, Inc., Public Service Commission of Maryland, National Association of Regulatory Utility Commissioners, California Public Utilities Commission, New York Public Service Commission, KMC Telecom Holdings, Inc., RCN Telecom Services, Inc., Wireless World, LLC, Level 3 Communications, LLC, Sprint Corporation, Association of Communications Enterprises, Starpower Communications, LLC, Competitive Telecommunications Association, Internet Access Coalition, Global NAPS, Inc., Pac-West Telecom, Inc., ICG Communications, Inc., Public Utilities Commission of Ohio, United States LEC Corp. and Focal Communications Corporation. Intervenors in support of the FCC and the United States were BellSouth Corporation, SBC Communications, Verizon Telephone Companies (including Verizon Minnesota, Verizon South Systems, Verizon Alaska, Verizon Arkansas, Verizon Midwest, Verizon California, Verizon Delaware, Verizon Florida, Verizon Hawaii, Verizon Maryland, Verizon New England, Verizon New Jersey, Verizon New York, Verizon North, Verizon Northwest, Verizon Pennsylvania, Verizon Washington, DC, Verizon West Coast, Verizon Southwest, and Verizon West Virginia),

Qwest Corporation, AT&T Wireless Services, Inc., and Micronesian Telecommunications Corporation.

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PETITION FOR WRIT OF CERTIORARI

Core Communications, Inc. (CoreTel) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, reproduced in the Appendix to this Petition (Pet. App.) at 1a-9a, is reported at 288 F.3d 429 (D.C. Cir. 2002). The order of the Federal Communications Commission, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* in CC Docket Nos. 96-98 and 99-68, is reported at 16 FCC Rcd. 9151 (2000) (Pet. App. 14a-37a). The FCC order is commonly referred to as the "*ISP Remand Order*" because it was issued pursuant to the D.C. Circuit's first reversal of the

FCC's attempt to regulate intercarrier compensation in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

JURISDICTION

The court of appeals' decision in *WorldCom* was released May 3, 2002. The court of appeals denied CoreTel's petition for rehearing on September 24, 2002. *See* Pet. App. 10a-11a. This petition is timely filed by operation of Rule 13, which provides 90 days to request certiorari after entry of an order denying discretionary review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 251(b)(5) of the Telecommunications Act of 1996, 47 U.S.C. § 251(b)(5), appears at Pet. App. 12a. Section 706(2)(C) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), appears at Pet. App. 13a.

STATEMENT

The *ISP Remand Order* represents the second failed attempt by the Federal Communications Commission (FCC) to establish a national policy governing the payments, known as "intercarrier compensation," owed to local telecommunications carriers that terminate Internet calls on their networks. For the second time in two years, the court of appeals reversed the agency, holding that the FCC had no statutory authority to promulgate regulations restricting intercarrier compensation for calls made to Internet Service Providers (ISPs). Nonetheless, the court of appeals remanded the rules to the FCC, despite never reaching their substantive validity, *without* vacating the agency's decision on the merits.

The Court's intervention in this case is warranted because the standard for *vacatur* employed by the D.C.

Circuit is inconsistent with the Administrative Procedure Act and this Court's precedent on agency authority. The court of appeals' decision provides no judicially manageable standards for determining whether an agency's unlawfully promulgated regulations should be vacated or, instead, merely remanded for reconsideration. Although this petition involves solely a question of administrative procedure, it is exceptionally important in view of the dominant role of the D.C. Circuit in our system of administrative law and the extreme practical significance of the judicial remedy for agency regulations reversed on appeal.

1. A brief synopsis of the agency proceedings and substantive decisions on intercarrier compensation may assist the Court in understanding the context of the FCC's order. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 251 *et. seq.* (West 2000) (1996 Act), fundamentally changed the telecommunications industry by enabling competitive ownership of facilities used to provide local telecommunications services. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). In creating this new framework, however, Congress preserved existing regulatory requirements, flowing from constitutional takings law, that compensation is owed to those whose facilities assist another carrier in serving customers. One of the means by which the 1996 Act preserves this doctrine is through a mechanism called "reciprocal," or "intercarrier," compensation. Section 251(b)(5) of the 1996 Act requires that a telecommunications carrier compensate other carriers that terminate its calls on their networks. This provision applies to all local telecommunications carriers and mandates compensation for every non-toll telephone call.

One of the central questions surrounding intercarrier compensation has been whether ISP-bound traffic, that is phone calls placed to an ISP to establish Internet connec-

tions, are subject to compensation. Many incumbent telephone companies have argued that these "dial-up" calls are not "local" traffic subject to § 251(b)(5), and thus that competitors serving ISPs should not be compensated for terminating such traffic. The FCC has repeatedly addressed this question, and each time has failed to explain why its assumption of authority over this issue is consistent with the 1996 Act.

2. The FCC has reached markedly inconsistent results in its decisions on reciprocal compensation for ISP-bound traffic. In a 1999 Declaratory Ruling, the FCC unequivocally held that § 251(b)(5) does not impose a compensation obligation for ISP-bound calls because such calls are jurisdictionally interstate communications when viewed "end-to-end" (that is, from the user's modem to the Internet). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd. 3689 (1999). The FCC ruled, however, that state commissions may nonetheless require, and regulate, compensation for ISP-bound calls under § 251(b)(5). *Id.*, 14 FCC Rcd. at 3705.[1]

On appellate review, the Court of Appeals for the D.C. Circuit found that the FCC's Declaratory Ruling lacked

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[1] Until the *ISP Remand Order* at issue in this petition, several states had decided that ISP-bound calls are indeed subject to reciprocal compensation; some states had also issued decisions under their ratemaking authority to regulate the amount and collection of compensation. *E.g.*, *Proceeding on Motion of the Commission to Examine Reciprocal Compensation*, Case No. 99-C-0529, Opinion and Order 99-10 (N.Y.P.S.C. Aug. 26, 1999); *Petition for Declaratory Order of TCG Delaware Valley*, P-00971256, Opinion and Order (Pa. P.U.C. June 16, 1998).

statutory authority and vacated the agency's decision. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (2000) (reprinted at Pet. App. 38a-53a). The court of appeals criticized the FCC for applying the murky "end-to-end" analysis in order to characterize ISP-bound calls as interstate and therefore ourside the scope of § 251(b)(5). *Id.*, 206 F.3d at 6-8 (Pet. App. 47a-50a). This analysis, the court held, did not provide a basis to conclude that ISP-bound calls were within the agency's statutory authority under § 251(b)(5) even if they are "jurisdictionally" interstate.[2]

The court concluded that this underlying error required that the decision be vacated, without regard to the merits of the FCC's decision. "Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling, ... we must vacate the ruling and remand the case." 206 F.3d at 8 (Pet. App. 50a). The court of appeals specifically set forth questions in its opinion that required the FCC to tie its analysis on remand to the statutory language in § 251(b)(5). *Bell Atlantic*, 206 F.3d at 9 (Pet. App. 52a-53a). It never reached the substantive challenges by the petitioners to the agency's refusal to preempt state authority over ISP-bound traffic.

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[2] Section 2(b) of the Communications Act divides jurisdiction over telecommunications between the FCC (interstate communications) and the states (intrastate communications). *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Although the FCC has some new jurisdiction over local (intrastate) communications under the 1996 Act, as the court of appeals explained the jurisdictional classification of communications traffic does not in itself provide statutory power to regulate reciprocal compensation, even for "interstate" communications. "However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation." *Bell Atlantic*, 206 F.3d at 8 (Pet. App. 50a).

3. In the 2001 *ISP Remand Order*, the FCC issued a stunning, and internally inconsistent, reversal of policy. It concluded that although ISP-bound calls are not local, carriers nonetheless ***could*** collect reciprocal compensation for them. *ISP Remand Order* ¶ 3 (Pet. App. 17a-18a). The order then created a federal intercarrier compensation rate for these calls, as well as a cap on the number of call minutes for which terminating local carriers will be compensated. *Id.* ¶ 8 (Pet. App. 22a-23a). The FCC held that this federal regime preempted all inconsistent state regulation. *Id.* ¶ 82 (Pet. App. 31a-32a). The agency attempted to support this radical policy not through § 251(b)(5), as it had originally tried and to which it was specifically directed on remand, but rather by relying on an obscure provision in § 251(g) that preserves the local market provisions of the *United States v. AT&T* antitrust consent decree until superceded by FCC rules. 47 U.S.C. § 251(g).

Scores of competitive local carriers, among them CoreTel, appealed the *ISP Remand Order* on grounds that it was issued without authority, unlawfully infringed on state regulatory authority, and constituted an unreasoned departure from agency precedent. Jurisdiction in the court of appeals was based on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

The court of appeals reversed. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *see* Pet. App. 1a-9a. The court held that the FCC's new reliance on § 251(g) "does not provide a basis for the Commission's action." *Id.* at 434. In other words, the FCC's remand approach had failed to rectify the defects in its prior § 251(b)(5) analysis and had not provided any other valid statutory basis for the regulatory power it asserted. Consequently, the court of appeals did not reach and did not decide any of the many substantive challenges to the rationale for and reasonableness of the agency's new reciprocal compensation rules, *id.* (Pet. App. at 8a-9a), stating

that it was deferring decision on "all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)." *Id.*

Inexplicably, however, the court of appeals merely remanded the *ISP Remand Order* while permitting its new rules to remain intact. The panel opinion explained that *vacatur* of the rules was unnecessary because, although the Commission had failed for a second time to justify its statutory authority over intercarrier compensation, "there is plainly a non-trivial likelihood that the Commission has authority" for its decision. *WorldCom*, 288 F.3d at 434 (Pet. App. 8a). The panel did not address why the Commission's earlier failure of "explanation" in *Bell Atlantic* warranted *vacatur* but a jurisdictional defect in the agency's decision on remand warranted only a further remand to the FCC. Moreover, the court of appeals did not explain why it was an appropriate appellate remedy to permit rules to remain in effect despite the lack of any appellate review of their rationale and record support under the Administrative Procedure Act.

4. Several carriers, including petitioner CoreTel, timely petitioned for rehearing and rehearing *en banc*, arguing that the court of appeals had departed from the settled practice of vacating any agency rule held to be without statutory authority and that the "non-trivial likelihood" standard, even if applicable to decisions reversed due to a failure of reasoned administrative explanation, should not apply to an agency's extra-jurisdictional actions. The court of appeals denied all petitions without opinion on September 24, 2002. (Pet. App. 10a-11a.)

SUMMARY OF ARGUMENT

This case presents an important question of federal law not yet decided by this Court – whether a federal court may permit an administrative agency to enforce rules that it had no statutory authority to promulgate. The issue posed here goes to the very foundation of the limits of agency power and represents a question of administrative procedure that, although rarely discussed, is of utmost practical importance. The court of appeals' approach of merely remanding unauthorized rules if there is "non-trivial likelihood" the agency may later identify a statutory basis for its actions turns the Administrative Procedure Act on its head and is drastically out of step with this Court's judgments on the scope of agency power.

The *WorldCom* decision contravenes fundamental principles of administrative law, as applied in many circuits, and evidences a trend of *ad hoc* appellate review of agency action that bears little respect for Congress's language or intent. This development is particularly troubling from the D.C. Circuit, a court that is the dominant source of administrative jurisprudence simply by virtue of geography. It also raises serious questions of separation of powers by sanctioning unilateral agency decisions on the scope of their own authority. This Court's supervisory oversight is therefore necessary in order to restore consistency to administrative procedure law and to ensure that individual panels of the D.C. Circuit do not continue to issue contradictory, unprincipled decisions that make the remedy for APA reversal turn on the subjective speculation of federal judges.

This petition presents a purely procedural question, but it is an administrative law issue of a type not addressed by this Court in decades. It is also the doctrinal companion to the Court's decision last term in *United States v. Mead Corp.*,

533 U.S. 218 (2001), in which the Court once again grappled with the bounds of agency expertise and judicial deference. This case invites the Court to answer a question not decided, but clearly implied, by *Mead*: whether agency action that exceeds jurisdictional authority must be vacated, without deference to the agency's expertise or reasoning.

REASONS FOR ISSUING THE WRIT

I. THE COURT'S ATTENTION IS REQUIRED TO RESTORE CONSISTENCY TO THE TREATMENT OF AN EXTREMELY IMPORTANT QUESTION OF ADMINISTRATIVE PROCEDURE BY THE COURTS OF APPEALS

The plain language of the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* (West 2000) (APA) and this Court's "axiomatic" holding in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), suggest quite directly that a reviewing court must vacate any administrative rule for which the promulgating agency lacks statutory authority. After holding that the FCC had no power to regulate intercarrier compensation for ISP-bound calls, the court of appeals below was obligated to vacate the *ISP Remand Order* in its entirety. The court's formulation of an *ad hoc* test for *vacatur* permits the enforcement of unlawfully adopted agency regulations at the unfettered discretion of reviewing courts, and for that reason warrants this Court's grant of *certiorari*.

A. The Court of Appeals Has Contravened Both The APA and This Court's Holding in *Bowen* In Permitting Enforcement of Unauthorized FCC Rules

1. Congress commands in the APA that federal courts reviewing a challenged agency rule "shall hold unlawful and set aside agency actions, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C) (Pet. App. 13a). An agency's jurisdiction lies in the "organic," or "enabling," statute by which Congress created and empowered the agency, in this case the Communications Act of 1934, as amended by the 1996 Act.

It is a bedrock principle of administrative jurisprudence that the sum total of an agency's powers is defined by its enabling statute. Thus, this Court declared in 1988 in *Bowen* that "it is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." 488 U.S. at 208 (holding that agencies may adopt retroactive rules only where permitted by statute). Agency action that falls outside the bounds of that limited authority is therefore null *ab initio*. *Id.*; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

The Court echoed *Bowen* last term in *Mead*, 533 U.S. at 227-228. That case, which focused primarily on refining the parameters of agency statutory interpretation established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984), cautioned that deference to

agency expertise has no place unless "the agency's exercise of authority is constitutional, ... and does not exceed its jurisdiction." 533 U.S. at 228, n.6. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). The implied corollary of this *dictum* is that, where the statutory authority of an agency is at issue – and not merely the agency's reasoning or judgment – judicial deference is inappropriate.

The requirement that agencies remain within the bounds of their authority is not merely formalistic. The Eighth Circuit, for example, has taken the mandate of § 706 of the APA quite seriously, stating that "[a]n agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside." *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1255-56 (8th Cir. 1998) (holding that the so-called "Housekeeping Statute," 5 U.S.C. § 301, provides no authority for substantive rulemaking).

2. This case presents a question left unaddressed by this Court last term in *Mead*. If an agency is entitled to no deference in decisions on its jurisdiction, what is the appropriate remedy for a reviewing appellate court where the agency's substantive rules exceed its statutory authority? The court of appeals below crafted from whole cloth a standard that permits agencies to promulgate and enforce rules without regard to the scope of authority granted by Congress. The "non-trivial likelihood" test, 288 F.3d at 434 (Pet. App. 8a), on its face appears directly inconsistent with the presumption in *Mead*, rooted in separation of powers, that agencies can permissibly act only where they have the statutory power to do so.

B. Agencies Should Not Be Accorded Deference When They Exceed Their Statutory Authority

1. The question whether an agency has the authority to act is distinct from, and more serious than, the question whether agency action is "reasonable" for purposes of judicial review under the APA. As to the latter question, it has become a foundational tenet of administrative law that agencies must be accorded deference in the interpretation of statutes Congress has placed within their care, insofar as they comport with the plain meaning or discernible purpose of the legislation. *Mead*, 533 U.S. at 227-28; *Chevron*, 467 U.S. at 843-44. The *Mead* case champions the "interpretive choices" that agencies make, requiring that they be given a "fair measure of deference" where they exhibit "care ... formality, and relative expertness." 533 U.S. at 228.

This judicial deference presumes agency authority, and conversely raises extremely troubling constitutional issues where a court deems an agency's action to be without statutory basis. One legal scholar has postulated, in reacting to the Court's establishment of *Chevron* deference, that the notion that "administrators should decide the scope of their own authority" "flatly contradicts separation-of-powers principles that date back to *Marbury v. Madison*." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987).[3]

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[3] Professor Sunstein advocates a "firm judicial hand" in reviewing issues of agency overreaching due to the "potential for self-interested decisions" that "ultimately redound[] to the agency's benefit." 101 HARV. L. REV. at 468. He notes specifically the constitutional implications of deferring to unelected agency official that are subject to none of "the ordinary electoral safeguards or the usual checks and balances. *Id.*

The D.C. Circuit has itself expressed concerns that presumptions in favor of agency authority may do violence to the Constitution. In *Railway Labor Executives' Assn. v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), the court of appeals rejected an agency's argument that Congress's failure to negate its authority in a particular area must be interpreted as an intent to grant that authority. It held that "[w]ere courts to presume a delegation of power absent an express withholding of such powers, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." 29 F.3d at 671. *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *Oil, Chemical and Atomic Workers Int'l Union*, 46 F.3d 82, 90 (D.C. Cir. 1995). Yet in this case, the same court of appeals rewarded such "hegemony," not by finding statutory authority where none existed, but in looking the other way when the FCC clearly overstepped its authority.

2. Nor is petitioner's question resolved by the notion that agencies may assume authority to take action in furtherance of an ambiguous statute or one that does not comprehensively address a regulatory problem. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974). In *Morton*, the Court granted agencies permission for "the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* That authority is limited, however, to instances in which the agency is required to "administer a congressionally created and funded program" or similarly specific policy. *Id.* In such circumstances, agency "gap-filling" is "necessarily require[d]" to carry out a clear Congressional statutory initiative — for example, the administration of a fund designed to assist low-income native Americans. *Id.* Absent that Congressional initiative, agency action that ex-

ceeds its jurisdiction is simply an exercise in self-aggrandizing bureaucracy.

Thus, while this Court has held that an agency is owed deference on the substantive implementation of its statutes, it has not provided that same favored treatment where it is unclear whether the agency may act in the first instance. For while courts must presume the value of agency expertise and refrain from second-guessing their decisions, bedrock issues of Congressional delegation of power cannot be deemed within the agency's expertise to decide. *See New York Shipping Ass'n v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989) (holding that it is inappropriate to defer to an agency where it is interpreting its own jurisdiction). As Justice Brennan once wrote, "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction." *Mississippi Power & Light v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting).

3. These cases stand in sharp contrast to those in which only the agency's reasoning, and not its jurisdiction, is questionable. *E.g.*, *Texas Ofc. of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) (remanding FCC order on "universal service" and access charge reallocations); *Allied-Signal v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993) (remanding regulatory fee allocation rules that the agency was authorized by statute to assess); *International Union, United Mine Workers of America v. Federal Mine Safety and Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990); *Maryland People's Counsel v. FERC*, 768 F.2d 450, 452 (D.C. Cir. 1985) (affirming FERC rules permitting natural gas producers to amend existing supply contracts). In these instances, application of *Chevron* deference remains appropriate, for it is altogether proper that agencies addressing issues committed to their expertise by Congress should enjoy lati-

tude in exercising that special competence. As such, this Court "ha[s] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844.

Not so when no such scheme has been delegated. *See Mead*, 121 S. Ct. 2172 n.6; *Adams Fruit*, 494 U.S. at 649. As in this case, where an agency acts beyond the scope of power delegated to it by Congress, the root policies supporting deference disappear. Yet that is in fact what the court of appeals has done in this case. By permitting the reciprocal compensation rules of the *ISP Remand Order* to stand, the court allows the agency the opportunity (for the third time) to parse the Communications Act in order to find a statutory "hook" for its substantive objectives. By failing to vacate the intercarrier compensation rules, the court of appeals allows the agency's view of its own authority, as a practical matter, to override the appellate court's holding. Thus, the D.C. Circuit's approach, if left uncorrected, injects highly problematic constitutional issues into administrative procedure and conflicts with the clear import of this Court's cases holding that administrative agencies are not entitled to deferential appellate review on questions of statutory jurisdiction.

C. The Court of Appeals' Reliance on a "Non-Trivial Likelihood" of Agency Authority Is Sharply Inconsistent With Administrative Law Procedure In Other Circuits and Presents Serious Issues of Unprincipled Judicial Decision Making

1. The D.C. Circuit has twice held on the merits that each of the FCC's attempts to rationalize reciprocal compensation with the Internet were groundless. *Bell Atlantic*, 206 F.3d at 6 (Pet App. 51a-53a); *WorldCom*, 288 F.3d at 433-34 (Pet. App. 8a-9a). In *Bell Atlantic*, the remedy was complete

vacatur. In *WorldCom*, by contrast, the court of appeals' insistence on statutory authorization melted, without explanation, into a hope that the FCC might articulate a defensible statutory basis for regulating reciprocal compensation for ISP-bound traffic. Accepting for the first time a "non-trivial likelihood" of authority in lieu of actual agency jurisdiction, the court of appeals established with no discussion a standard of administrative law that is inconsistent with prevailing jurisprudence and that presents a very serious risk of unprincipled judicial decision making.

2. This Court's reasoning in *Bowen* has become the linchpin of agency review, producing a fairly consistent treatment of agency jurisdictional defects by *vacatur* of extra-jurisdictional administrative actions. *E.g.*, *O'Keefe*, 132 F.3d at 1257 ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside."); *Butts v. City of New York Department of Housing Preservation & Development*, 990 F.2d 1397, 1409-11 (2d Cir. 1993); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992) (rejecting retroactive application but noting "tension" between *Bowen* and cases permitting application of new laws enacted during pendency of litigation); *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991) (rejecting retroactive application of amendments to criminal False Claims Act).

Indeed, until *WorldCom*, the D.C. Circuit followed this approach and routinely vacated agency rules found to exceed the scope of statutory authority. *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (vacating EPA program under the Clean Air Act on native American lands); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (vacating EPA rule governing oxygenate fuel additives); *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154,

1157 (D.C. Cir. 1992) (reversing Copyright Office's imposition of interest on copyright royalties under *Bowen*'s prohibition on retroactive rulemaking in absence of express Congressional intent). In applying *Bowen*, the D.C. Circuit has flatly declared that "if there is no statute conferring authority, a federal agency has none." *Michigan*, 268 F.3d at 1081. The uniform result has been *vacatur* of the rules. *See id.* at 1089. *See also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them.") (abrogating unlawful contract executed by OTS).[4]

The court of appeals has been particularly stringent when reviewing other FCC actions, and has vacated numerous rules for which the agency had not supplied statutory support. *Fox Television Stations v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (vacating cable/broadcast cross-ownership rules); *WorldCom, Inc. v. FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001) (vacating FCC decision that Digital Subscriber Line service fell under its exclusive jurisdiction as "interstate access service"); *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1998) (vacating portions of FCC's payphone compensation rules; subsequent history omitted); *COMSAT Corp. v. FCC*, 114 F.3d 223, 225 (D.C. Cir. 1998) (vacating FCC amendment imposing special fees

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[4] Numerous other decisions by the court of appeals have vacated unauthorized agency rules even prior to this Court's instruction in *Bowen*. *Middle South Energy v. FERC*, 747 F.2d 763 (D.C. Cir. 1984); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). Like *Bowen*, these cases begin from the proposition that a federal agency "is a creation of Congress," such that "its powers can be decided only by considering the powers Congress specifically granted it." *National Petroleum Refiners*, 482 F.2d at 674.

on satellite licensees); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1141 (D.C. Cir. 1994) (vacating FCC collocation rules as a constitutional taking lacking statutory authority).

3. In remanding the *ISP Remand Order* despite reversing the agency's assertion of statutory authority over the subject matter, the court of appeals' decision in *WorldCom* omits all reference to *Bowen*, its progeny, and that court's own consistent practice. It creates for the first time a new standard of review of agency jurisdiction, the "non-trivial likelihood" test, 288 F.3d at 434 (Pet. App. 9a), but does not draw this test from any established decision or doctrine. Instead, the court of appeals purports to base this new law on its conclusion in an earlier case that "'[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that my itself be changed.'" 288 F.3d at 434 (quoting *Allied-Signal*, 988 F.2d at 150-51 (Pet App. 8a-9a)).

Yet the court of appeals' reliance on *Allied-Signal* to justify remand is spurious. That case did not involve a challenge to an agency's statutory authority. To the contrary, it was simply a review of Nuclear Regulatory Commission action with respect to regulatory cost recovery that the court of appeals found "cannot be viewed as reasoned decision-making." 988 F.2d at 148, 150. The agency's error was clearly curable, requiring that the court of appeals simply remand it for further consideration. In short, the "seriousness of the order's deficiencies" was insubstantial. Importantly, the *Allied-Signal* test appears never to have been applied to avoid *vacatur* of agency rules reversed for lack of statutory jurisdiction. Therefore, for the court of appeals to imply that

Allied-Signal permits remand of, rather than vacating, the FCC's order in this case is not sensible.[5]

4. The court of appeals' "non-trivial likelihood" test is also inconsistent with what appears to be settled practice in other circuits. As noted above, the Eighth Circuit has adhered closely to the theory of *Bowen* and been unsympathetic to agencies that regulate in excess of their jurisdiction. *E.g.*, *O'Keefe*, 132 F.3d at 1254. Even in cases in which the only question is whether an agency's rationale and explanation are reasonable, other courts have adopted an approach that routinely compels reversal on a finding of extra-jurisdictional agency action.

For example, in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), the Ninth Circuit let stand the United States Fish and Wildlife Service's addition of the Spring Snail onto the endangered species list, despite serious defects in the agency's rulemaking proceedings (the agency relied on key evidence supporting the addition after the close of the period for comment). Chastising the agency for its "significant procedural error," the Court observed that "[o]rdinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid." 58 F.3d at 1405. Nonetheless, the Ninth Circuit remanded the endan-

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[5] Although not germane to the issue posed in this petition, the court of appeals implied that the FCC's new reciprocal compensation regulations exhibited no "disruptive consequences." 288 F.3d at 434 (quoting 988 F.2d at 150-51) (Pet App. 9a). To the contrary, however, appellants had demonstrated the substantial financial loss that the new rules would cause, likely resulting in their exit from the market. *See* 288 F.3d at 432 (Pet. App. 4a). The court of appeals' cavalier acceptance of the opposite conclusion without record support is inconsistent with the APA's "arbitrary and capricious" standard for judicial review. *See* 5 U.S.C. § 706(2)(A) (Pet. App. 13a).

gered species list, without vacating it, due to the real danger that the Spring Snail might become extinct if the rule were voided. 58 F.3d at 1405-06.

The contrast between *Idaho Farm Federation* and *WorldCom* cannot be more clear. Although each evinces the concept of equitable flexibility in deciding an appellate remedy, the Ninth Circuit's approach assumes that vacating regulations based on invalid procedures or deficient reasoning is the ordinary rule, subject to exception in extraordinary circumstances. Under the *WorldCom* approach, however, the presumption is reversed, and only in the unusual situation in which there is not even a "trivial" chance the agency can correct its decision will unlawfully promulgated rules be vacated. Thus, the court of appeals has created a system in which the most serious administrative errors — which as discussed above strike at the heart of our traditional notions of separation of powers — are subject to the most lenient appellate remedies. This has things backwards. If there is a presumption in favor of remand rather than *vacatur,* it should apply where the agency clearly has jurisdiction but provided a flawed rationale or process to substantiate its actions, not where agency action is legally *ultra vires.*

Idaho Farm Federation also illustrates why the Court's attention to this case is so needed. In applying this "equitable concern," the Ninth Circuit cited and followed a 1991 decision of the D.C. Circuit providing that weighing of equities may in some circumstances warrant leniency to the agency. *Id.* at 1406 (citing *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)). It is precisely this type of reliance on the D.C. Circuit that requires reversal of *WorldCom.* The vast majority of significant administrative law cases originate in the D.C. Circuit, and that court's decisions have for decades set the tone for federal administrative law nationwide. Thus, the impact of *WorldCom* is far greater

than the specific reciprocal compensation rules at issue, because the D.C. Circuit's "non-trivial likelihood" test may be adopted by other courts. Despite its lack of reasoning and precedent, the court of appeals' decision below may start an appellate slide toward the amorphous "non-trivial likelihood" standard in lieu of the *vacatur* requirement that *Mead*, *Bowen* and the language of the APA all clearly imply. *See Mead*, 533 U.S. at 228 n.6 (suggesting that agency actions beyond their jurisdiction merit no judicial deference and should be reversed summarily).

5. Even without reference to other circuits, *WorldCom* evidences an unexplained collapse of the D.C. Circuit into what appears to be *ad hoc*, results-oriented appellate review of agency action. Two other communications decisions in 2002 have applied a similarly careless approach to the question of whether *vacatur* of agency rules is required, with (predictably) inconsistent results.

In *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the court of appeals found that FCC rules limiting the number of local television stations owned by one entity lacked a rational connection with Congressional intent for regulation that "is 'necessary in the public interest.'" 284 F.2d at 165. It nonetheless permitted the ownership rules to stand. Circuit Judge Sentelle issued a strong dissent on this point, stating that the panel's finding required that it vacate the challenged rules as being without statutory authority. Judge Sentelle criticized the agency for having simply "assumed the need for the rule, and then attempted to justify it," 284 F.3d at 171, which under prior D.C. Circuit practice would have resulted in *vacatur*. *Id.* (quoting *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 876 (D.C. Cir. 1999)). *Sinclair* thus appears to suffer from the same ill-conceived jurisdictional deference established in *WorldCom*, demonstrating the dangerous trend now at work.

At the other end of the spectrum is *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), in which the court of appeals vacated a different FCC decision solely on the ground that the agency's reasoning was incomplete. The *USTA* opinion, issued after *WorldCom*, addressed whether the FCC had ordered monopoly telephone companies to "share" customer lines with Digital Subscriber Line providers without adequately considering whether alternative customer lines were available. *USTA*, 290 F.3d at 428. The court of appeals decried this "naked disregard of the competitive context" of local telecommunications, vacating the order completely, without citing to or harmonizing the *WorldCom* opinion. Thus, the outcome appears to be the result of the panel's visceral reaction to the FCC's implementation of the procompetitive provisions of the 1996 Act, a difference on policy that, even if appropriate for an appellate court, should hardly dictate the APA remedy.

6. Courts of appeals should no more base decisions about whether to remand or vacate agency action on their policy predilections than they may indulge in policymaking. Courts are subject to well-settled appellate constraints that prohibit judges from displacing or second-guessing agency expertise. *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943). *See also Chevron*, 47 U.S. at 843. These strictures are not cosmetic, but are wedded to fundamental principles of Congressional delegation and separation of powers. *See Railway Executives*, 29 F.3d at 671; *O'Keefe*, 132 F.3d at 1257. *See also* Sunstein, 101 Harv. L. Rev. at 467.

The evil of the court of appeals' approach is thus that it delegates unfettered discretion to individual appellate panels to decide whether to remand or to vacate unlawful agency rules without any judicially manageable standards. This trend of *ad hoc* decisions on this important practical question

is sure to continue in the D.C. Circuit, as recent cases clearly suggest, and may extend to other circuits as well. Unprincipled court of appeals' decisions on the appellate remedy for unlawful agency action is the natural result of *WorldCom*, one this Court should grant *certiorari* to review and correct.

II. THE COURT OF APPEALS' ERROR IN *WORLDCOM* WILL HAVE FAR-REACHING ADVERSE EFFECTS ON AGENCY POWER THAT CANNOT BE CONTROLLED BY THE COURTS

The *WorldCom* judgment permits the FCC to continue enforcing its new ISP reciprocal compensation rules, with the caveat that on remand it must identify a valid statutory basis consistent with the panel's opinion. Yet as a result of this approach, it is likely that there will never be a determination as to whether the agency has jurisdiction over ISP-bound traffic. As a realistic matter, *the FCC need never act on remand because the substance of its rules can remain in effect, in perpetuity, without any further decision by the agency and prior to any appellate review on the merits.*

1. This precedent does nothing less than reward and encourage renegade agency action. If permitted to stand, the *WorldCom* opinion will allow all federal agencies to exceed and self-determine their authority, effectively negating the ability of Congress and the federal courts to prescribe the bounds of their regulatory power.

The legal effect of the panel's approach is to permit the continued enforcement of rules that have never been, and may never be, subject to substantive judicial review. The WorldCom case marks the second instance in which the court of appeals declined the opportunity to assess the rea-

sonableness of intercarrier compensation for ISP-bound calls. It will be years before any court has an opportunity to determine whether the ISP reciprocal compensation rules are based on valid statutory authority. Having remanded the case to the Commission "simply ... for further proceedings," 288 F.3d at 434, the court of appeals provided the FCC with no compulsion under which the agency must justify its exercise of authority.

The court of appeals' decision returns this core issue of agency jurisdiction to the dozens of open local competition dockets that await FCC resolution. Unfortunately, this Court has no assurance that the matter will return from those depths. The FCC's long delay in consideration of D.C. Circuit remands is legendary. (For instance, it took the agency nearly two years to decide this case after remand in *Bell Atlantic*.) And here the FCC has no incentive to issue *any* decision on remand because its substantive objective — including the preemption of state regulation of ISP-bound traffic — has already been achieved. Its intercarrier compensation rules will stay in effect unless and until the FCC makes a remand decision ripe for judicial review; the agency thus has a powerful incentive to do absolutely nothing.

More importantly, perhaps, the only means by which the court of appeals could reassert appellate authority over ISP reciprocal compensation would be through a writ of mandamus compelling FCC action "unreasonably delayed." *See* 5 U.S.C. § 706(1) (Pet. App. 13a). These extraordinary writs are seldom granted, however. *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984). This judicial restraint is borne out of a sense of comity with the Executive Branch, reserving review of unreasonable delay of action only for "extraordinary circumstances." *In re International Chemical Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). *See Cutler v. Hayes*, 818 F.2d 879 (D.C.

Cir. 1987); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983). Moreover, the court of appeals' historical treatment of agency delay has entailed an intensely fact-specific inquiry, providing no bright-line test for determining appropriate judicial intervention. *Compare Cutler*, 818 F.2d at 897 (the Court must examine the length of time action has been pending), with *Auchter*, 702 F.2d at 1157-58 (the Court must evaluate the reasonableness of the delay in the context of the agency's statutory mandates, but "[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake."). It is manifestly unclear under this precedent whether, if the FCC's reconsideration of the *ISP Remand Order* is years delayed, the court of appeals will later have cause to compel it to act.

Even having failed to advance any defensible theory to authorize the *ISP Remand Order*, the FCC won in the court of appeals. Despite having no jurisdiction to regulate ISP reciprocal compensation, the FCC is indeed regulating it. Its scheme for restricting the recovery of intercarrier compensation by new competitive entrants remains in force and, though it is likely to have an irreversible negative impact on the competitive industry, remains immune from substantive judicial review. No court has ever passed on the substantive soundness of the rules, under *Chevron* or any other standard. Thus, until the FCC makes another formal attempt to reveal its authority for intercarrier compensation rules – an effort for which there is no court-ordered requirement – the rules will remain immune from judicial scrutiny. This cannot be the appropriate appellate response to an agency that has twice been held to have exceeded its jurisdiction in seeking to regulate reciprocal compensation for ISP-bound traffic.

2. The consequences of *WorldCom* are thus extremely dangerous. Federal administrative agencies can lawlessly

promulgate rules that exceed their authority, confident that under the "non-trivial likelihood" standard, appellate review will, at worst, only result in remand.[6] The decision therefore threatens to create a new administrative despotism in America, in which bureaucracies act unconstrained by statutory limits and have an unlimited number of chances to identify some basis for their rules. All the while, and completely without regard to their substantive content, agency rules will remain in effect — despite jurisdictional invalidity — until the agencies themselves affirmatively decide to act. This is a recipe for disaster and a classic example of the judiciary abdicating its APA and constitutional responsibility to control wayward bureaucracies through application of Congress's jurisdictional limitations.

As a matter of administrative law doctrine, accepting review in this case will enable the Court to complete *Bowen* and *Mead* by finally clarifying that agency action taken without authority must be vacated, without deference to the agency's interpretation or policies. Because this Court's prior decisions have only implied this conclusion, stopping short of expressly deciding the issue, the court of appeals was able to create a new *vacatur* standard in *WorldCom* and fashion relief, apparently based on its own views of commu-

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[6] Indeed, in appeals subsequent to *WorldCom*, the FCC has not hesitated to argue that under the "non-trivial likelihood" standard, remand is the only appropriate appellate remedy. In the *USTA* case described herein, the FCC stated in its Response to WorldCom, Inc's Motion for Partial Stay of Mandate repeated back to the court of appeals the WorldCom standard, stating that the standards for *vacatur* "require the Court to consider whether there is a 'non-trivial likelihood' that the agency lawfully could reinstate the rule on remand, and whether vacatur followed by reinstatement on remand could result in 'disruptive consequences.'" FCC Response at 1-2, Case Nos. 00-1012 *et al.* (Aug. 16, 2002).

nications policy, completely indifferent to the validity or legal merits of the challenged regulations. This approach, unfortunately repeated by the D.C. Circuit in a number of recent cases, threatens to dismantle decades of appellate practice in favor of unprincipled judicial policymaking. With the increasing politicization of both agencies and the courts, this trend – if left unchecked – will reward officials and judges who utilize social engineering, rather than statutory mandates, to regulate in their own image.

CONCLUSION

For all these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 02-____

IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S APPENDIX

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WorldCom, Inc., Petitioner v. Federal Communications Commission and United States of America, Respondents; Sprint Corporation, *et al.*, Intervenors

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United States Court of Appeals
For the District of Columbia Circuit

288 F.3d 429; 2002 U.S. App. LEXIS 8542

February 12, 2002, Argued
May 3, 2002, Decided

WILLIAMS, *Senior Circuit Judge*: Section 251(b)(5) of the Telecommunications Act of 1996, 47 U.S.C. §§ 151 (the "1996 Act" or the "Act"), directs all local exchange carriers ("LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251 (b)(5). In the order before us the Federal Communications Commission held that under § 251(g) of the Act it was authorized to "carve out" from § 251(b)(5) calls made to internet service providers ("ISPs") located within the caller's local calling area. It relied entirely on § 251(g). Because that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act, we find the Commission's reliance on § 251(g) precluded. Thus we remand the case. Because there may well be other legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs, we neither vacate the

order nor address petitioners' attacks on various interim provisions devised by the Commission.

Due in part to the 1996 Act, local telephone service areas are now typically (perhaps universally) served by more than one LEC. The reciprocal compensation requirement of § 251(b)(5), quoted above, is aimed at assuring compensation for the LEC that completes a call originating within the same area. Although its literal language purports to extend reciprocal compensation to *all* "telecommunications," the Commission has construed it as limited to "local" traffic only. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16012-13, ¶¶ 1033-34, 16015-16, ¶ 1040 (1996) ("Local Competition Order"); 47 C.F.R. § 51.701(a). For long distance calls, by contrast, the long-distance carrier collects from the user and pays both LECs — the one originating and the one terminating the call. Local Competition Order, 11 FCC Rcd. at 16013, ¶ 1034.

In an earlier order, the Commission excluded ISP calls from the reach of § 251(b)(5) on the theory that they were indeed not "local." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (1999) ("Initial Order"). It reached this conclusion by applying its "end-to-end" analysis, traditionally employed in determining whether a call was jurisdictionally interstate or not, stressing that ISP-bound traffic ultimately reaches websites that are typically located out-of state. *See id.* at 3689-90, ¶ 1, 3695-98, ¶¶ 10-12, 3703, ¶ 23 (1999). On review, we held that the order had failed to adequately explain why the traditional "end-to-end" jurisdictional analysis was relevant to deciding whether ISP calls fitted the local call or the long-distance call model, and

vacated and remanded the order. *Bell Atlantic Tel. Cos. v. FCC*, 340 U.S. App. D.C. 328, 206 F.3d 1, 5, 8 (D.C. Cir. 2000)

On remand, the FCC again reached the conclusion that the compensation between two LECs involved in delivering internet-bound traffic to an ISP should not be governed by the reciprocal compensation provision of § 251(b)(5). *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, 9152-53, ¶ 1 (2001) ("*Remand Order*"). This decision rested, as we said, on § 251(g). Having thus taken ISP calls out of § 251(b)(5)'s reciprocal compensation obligation, the FCC proceeded to establish what it believed was an appropriate cost recovery mechanism. *Remand Order*, 16 FCC Rcd. at 9154, ¶ 4. The system adopted was "bill-and-keep," whereby each carrier recovers its costs from its own end-users. *Id.*

In reaching the bill-and-keep solution, the Commission pointed to a number of flaws in the prevailing intercarrier compensation mechanism for ISP calls, under which the originating LEC paid the LEC that served the ISP. Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls. The Commission saw this as leading, at least potentially, to ISPs' charging *their* customers below cost. *Remand Order*, 16 FCC Rcd. at 9153, ¶ 2, 9154-55, ¶¶ 4-6, 9162, ¶¶ 19-21.

To smooth the transition to bill-and-keep (but without fully committing itself to it), the FCC adopted several interim cost-recovery rules that sought to limit arbitrage

opportunities by lowering the amounts and capping the growth of ISP-related intercarrier payments. These tend to force ISP-serving LECs to recover an increasing portion of their costs from their own subscribers rather than from other LEC's. *Remand Order*, 16 FCC Rcd. at 9155-57, ¶ 7-8. The transitional rules take effect on the expiration of existing interconnection agreements. *Id.* at 9189, ¶ 82. Finally, the Commission specified that, having carved ISP-bound calls out of § 251(b)(5) under § 251(g), it was establishing the interim compensation regime under its general authority to regulate the rates and terms of interstate telecommunications services and interconnections between carriers under § 201 of the Act; as a result, the state regulatory commissions would no longer have jurisdiction over ISP-bound traffic as part of their power to resolve LEC interconnection issues under § 252(e)(1) of the Act. *Id.*

Two sets of petitioners now challenge the Remand Order. One, headed by .WorldCom (collectively "WorldCom"), consists of competitive LECs that deliver calls to ISPs, and thus stand to lose reciprocal compensation payments. These companies contend that the Commission erred in finding that § 251(g) authorized Commission exclusion of such calls from § 251(b)(5), and that, in any event, the interim compensation rules that the FCC adopted were not a product of reasoned decision making and are contrary to the Act's terms. The other group, composed of several states and state regulatory commissions, complains that the order unlawfully preempts their authority to determine the compensation of ISP-serving LECs.

Section 251(g) reads as follows:

(g) Continued enforcement of exchange access and interconnection requirements.

On and after [the date of enactment of the

> Telecommunications Act of 1996,] each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, *information access*, and exchange services for such access *to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding [the date of enactment of the Telecommunications Act of 1996]* under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after [such date of enactment]. During the period beginning on [such date of enactment] and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

47 U.S.C. § 251 (g) (emphasis added). Both sides assume that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), is applicable, so that we must defer to any reasonable Commission interpretation not precluded by the language of the statute, read with the ordinary tools of statutory construction. We agree with petitioners that § 251(g) is not susceptible to the Commission's reading.

On its face, § 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory "interconnection restrictions and obligations," including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superceded by Commission

action implementing the Act. As the Conference Report explained, "because the [Act] completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place.... Accordingly, the conference agreement includes a new section 251(g)." H.R. Rep. 104-458, at 122-23 (1996).

On a prior occasion, the Commission also framed the scope of § 251(g) in similarly narrow terms:

> The term "information access" first appears [in the Act] in sections [sic] 251(g). That provision is a *transitional enforcement mechanism* that obligates the incumbent LECs to continue to abide by equal access and nondiscriminatory interconnection requirements of the [AT&T Consent Decree] when such carriers "provide exchange access, information access and exchange services for such access to interexchange carriers and information service providers...." Because the provision incorporates into the Act, on a transitional basis, these [AT&T Consent Decree] requirements, the Act uses [AT&T Consent Decree] terminology in this section. *However, this provision is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission.*

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 15 FCC Rcd 385, 407, ¶ 47 (1999) (footnote omitted) (emphasis added).

Of course such explanatory language can't be assumed to be exclusive; legislative or agency explanations of a provision may naturally tend to focus on its most salient features. Thus, despite legislative history speaking only in

terms of the Consent Decree, plainly the preexisting "restrictions and obligations" covered by § 251(g) are *not* limited to Consent Decree obligations; the statute itself explicitly embraces pre-existing obligations under a "regulation, order, or policy of the Commission." *See also Noland v. Shalala*, 304 U.S. App. D.C. 232, 12 F.3d 258, 262 (D.C. Cir. 1994) ("Although the legislative history ... suggests an exclusive focus [of the statutory provision in question], the statutory language is broader and may permit [an alternative] construction."). But nothing in § 251(g) seems to invite the Commission's reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations.

We will assume without deciding that under § 251(g) the Commission might *modify* LECs' pre-Act "restrictions" or "obligations," pending full implementation of relevant sections of the Act. The Fifth Circuit appeared to make that assumption in *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), where it implicitly relied on § 251(g) (by quoting language from an Eighth Circuit case, *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), in sustaining modifications of pre-Act regulations governing the access charges paid to LECs by inter-exchange carriers ("IXCs"). 265 F.3d at 324-25. But this assumption is not enough to justify the Commission's action here, as it seems uncontested — and the Commission declared in the Initial Order — that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. *See* 265 F.3d at 324-25. *see also id.* at 3690, P 1, 3707-3710, ¶¶ 28-36. The best the Commission can do on this score is to point to pre-existing LEC obligations to provide interstate access for ISPs. *See, e.g.*, Remand Order, 16 FCC Rcd at 9164, ¶ 27; *In the Matter of MTS & WATS Market Structure*, 97 F.C.C.2d 682,

711-15, ¶¶ 77-83 (1983). Indeed, the Commission does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided "to interexchange carriers and information service providers"; LECs' services to other LECs, even if en route to an ISP, are not "to" either an IXC or to an ISP.

Having found that § 251(g) does not provide a basis for the Commission's action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes "telephone exchange service" or "exchange access" (as those terms are defined in the Act, 47 U.S.C. §§ 153 (16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the "telecommunications" covered by § 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5); *see* § 252(d)(B)(i) (referring to bill-and-keep). Indeed these are only samples of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5).

Moreover, we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures.

Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5)

and 252(d)(B)(i)). *See, e.g., Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm.*, 300 U.S. App. D.C. 198, 988 F.2d 146, 150-51 (D.C. Cir. 1993) ("The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'"). Thus, we simply remand the case to the Commission for further proceedings.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WorldCom Inc.,
Petitioner,

v.

Federal Communications
Commission and United
States of America,
Respondents.

Sprint Corporation, et al.,
Intervenors

Consolidated with 01-1229, 01-1243,
01-1255, 01-1256, 01-1257, 01-1274,
01-1310, 01-1311, 01-1313, 01-1321

BEFORE: Ginsburg, Chief Judge, Edwards,
Sentelle, Henderson*, Randolph, Rogers, Tatel,
and Garland*, Circuit Judges, and Williams,
Senior Circuit Judge

ORDER

Upon consideration of petitioner Core Communications, Inc.'s petition for rehearing en banc, and in the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: Michael C. McGrail
Deputy Clerk

* Circuit Judge Henderson and Circuit Judge Garland did not participate in this matter.

Telecommunications Act of 1996
Section 251(b)(5)
47 U.S.C. § 251(b)(6)

OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.— Each local exchange carrier has the following duties:

(5) RECIPROCAL COMPENSATION. — The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Administrative Procedure Act
Section 706
5 U.S.C. § 706

SCOPE OF REVIEW — To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed;

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewing on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extend that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of the Local Competition
Provisions in the Telecommunications Act
Of 1996

Intercarrier Compensation for
ISP-Bound Traffic

CC Docket Nos. 96-98, 99-68

ORDER ON REMAND AND REPORT AND ORDER

Adopted: April 18, 2001
Released: April 27, 2001

By the Commission: Chairman Powell issuing a statement; Commissioner Furchtgott-Roth dissenting and issuing a statement.

INTRODUCTION

1. In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs). We previously found in the *Declaratory Ruling*[1] that such traffic is interstate traffic subject to the

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd. 3689 (1999) (*Declaratory Ruling* or *Intercarrier Compensation NPRM*).

jurisdiction of the Commission under section 201 of the Act[2] and is not, therefore, subject to the reciprocal compensation provisions of section 251(b)(5).[3] The Court of Appeals for the District of Columbia Circuit held on appeal, however, that the *Declaratory Ruling* failed adequately to explain why our jurisdictional conclusion was relevant to the applicability of section 251(b)(5) and remanded the issue for further consideration.[4] As explained in more detail below, we modify the analysis that led to our determination that ISP-bound traffic falls outside the scope of section 251(b)(5) and conclude that Congress excluded from the "telecommunications" traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs. Having found, although for different reasons than before, that the provisions of section 251(b)(5) do not extend to ISP-bound traffic, we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic.

2. We recognize that the existing intercarrier compensation mechanism for the delivery of this traffic, in which the originating carrier pays the carrier that serves the ISP, has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets.

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[2] *See* 47 U.S.C. § 201, Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). Hereinafter, all citations to the Act and to the 1996 Act will be to the relevant section of the United States Code unless otherwise noted.

[3] 47 U.S.C. § 251(b)(5).

[4] *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

As we discuss in the *Unified Intercarrier Compensation NPRM*,[5] released in tandem with this Order, such market distortions relate not only to ISP-bound traffic, but may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users. Thus, the *NPRM* initiates a proceeding to consider, among other things, whether the Commission should replace existing intercarrier compensation schemes with some form of what has come to be known as "bill and keep."[6] The *NPRM* also considers modifications to existing payment regimes, in which the calling party's network pays the terminating network, that might limit the potential for market distortion. The

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[5] Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001) ("*Unified Intercarrier Compensation NPRM*" or "*NPRM*").

[6] "Bill and keep" refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16045 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996); Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997); *further recon. pending*. Bill and keep does not, however, preclude intercarrier charges for transport of traffic between carriers' networks. *Id.*

regulatory arbitrage opportunities associated with intercarrier payments are particularly apparent with respect to ISP-bound traffic, however, because ISPs typically generate large volumes of traffic that is virtually all one-way -- that is, delivered to the ISP. Indeed, there is convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments. Accordingly, in this Order we also take interim steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic while we consider the broader issues of intercarrier compensation in the *NPRM* proceeding.

EXECUTIVE SUMMARY

3. As presaged above, we must wrestle with two difficult issues in this Order: first, whether intercarrier compensation for ISP-bound traffic is governed by section 251 or section 201; and, if the latter, what sort of compensation mechanism should apply. The first question is difficult because we do not believe it is resolved by the plain language of section 251(b)(5) but, instead, requires us to consider the relationship of that section to other provisions of the statute. Moreover, we recognize the legitimate questions raised by the court with respect to the rationales underlying our regulatory treatment of ISPs and ISP traffic. We seek to respond to those questions in this Order. Ultimately, however, we conclude that Congress, through section 251(g),[7] expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic. Accordingly, we affirm our conclusion in the *Declaratory Ruling* that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5).

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[7] 47 U.S.C. § 251(g).

4. Because we determine that intercarrier compensation for ISP-bound traffic is within the jurisdiction of this Commission under section 201 of the Act, it is incumbent upon us to establish an appropriate cost recovery mechanism for delivery of this traffic. Based upon the record before us, it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users. As we recognize in the *NPRM*, intercarrier compensation regimes that require carrier-to-carrier payments are likely to distort the development of competitive markets by divorcing cost recovery from the ultimate consumer of services. In a monopoly environment, permitting carriers to recover some of their costs from interconnecting carriers might serve certain public policy goals. In order to promote universal service, for example, this Commission historically has capped end-user common line charges and required local exchange carriers to recover any shortfall through per-minute charges assessed on interexchange carriers.[8] These sorts of implicit subsidies cannot be sustained, however, in the competitive markets for telecommunications services envisioned by the 1996 Act. In the *NPRM*, we suggest that, given the opportunity, carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Thus carriers have every incentive to compete, not on basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses.

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[8] Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 15998-99 (1997) (*Access Charge Reform Order*), *aff'd, Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

5. We believe that this situation is particularly acute in the case of carriers delivering traffic to ISPs because these customers generate extremely high traffic volumes that are entirely one-directional. Indeed, the weight of the evidence in the current record indicates that precisely the types of market distortions identified above are taking place with respect to this traffic. For example, comments in the record indicate that competitive local exchange carriers (CLECs), on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic.[9] Moreover, the traffic imbalances for some competitive carriers are in fact much greater, with several carriers terminating more than forty times more traffic than they originate.[10] There is nothing inherently wrong with carriers having substantial traffic imbalances arising from a business decision to target specific types of customers. In this case, however, we

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[9] *See, e.g.*, Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC (November 6, 2000); *see also* Verizon Remand Comments at 2 (Verizon will be billed more than one billion dollars in 2000 for Internet-bound calls); Letter from Richard J. Metzger, Focal, to Deena Shetler, Legal Advisor to Commissioner Gloria Tristani, FCC (Jan. 11, 2001)(ILECs owed $1.98 billion in reciprocal compensation to CLECs in 2000). On June 23, 2000, the Commission released a Public Notice seeking comment on the issues raised by the court's remand. *See* Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit, CC Docket Nos. 96-98, 99-68, Public Notice, 15 FCC Rcd 11311 (2000) (*Public Notice*). Comments and reply comments filed in response to the *Public Notice* are identified herein as "Remand Comments" and "Remand Reply Comments," respectively. Comments and replies filed in response the 1999 *Intercarrier Compensation NPRM* are identified as "Comments" and "Reply Comments," respectively.

[10] *See, e.g.*, Verizon Remand Comments at 11, 21.

believe that such decisions are driven by regulatory opportunities that disconnect costs from end-user market decisions. Thus, under the current carrier-to-carrier recovery mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its costs from originating carriers. This result distorts competition by subsidizing one type of service at the expense of others.

6. Although we believe this arbitrage opportunity is particularly manifest with respect to ISP-bound traffic, we suggest in the *NPRM* that any compensation regime based on carrier-to-carrier payments may create similar market distortions. Accordingly, we initiate an inquiry as to whether bill and keep is a more economically efficient compensation scheme than the existing carrier-to-carrier payment mechanisms. Alternatively, the record developed in that proceeding may suggest modifications to carrier-to-carrier cost recovery mechanisms that address the competitive concerns identified above. Based upon the current record, however, bill and keep appears the preferable cost recovery mechanism for ISP-bound traffic because it eliminates a substantial opportunity for regulatory arbitrage. We do not fully adopt a bill and keep regime in this Order, however, because there are specific questions regarding bill and keep that require further inquiry, and we believe that a more complete record on these issues is desirable before requiring carriers to recover most of their costs from end-users. Because these questions are equally relevant to our evaluation of a bill and keep approach for other types of traffic, we will consider them in the context of the *NPRM*. Moreover, we believe that there are significant advantages to a global evaluation of the intercarrier compensation mechanisms applicable to different types of traffic to ensure a more systematic, symmetrical treatment of these issues.

7. Because the record indicates a need for immediate action with respect to ISP-bound traffic, however, in this Order we will implement an interim recovery scheme that: (i) moves aggressively to eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-bound by lowering payments and capping growth; and (ii) initiates a 36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to adopt an alternative mechanism based upon a more extensive evaluation in the *NPRM* proceeding. Specifically, we adopt a gradually declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic. We also cap the amount of traffic for which any such compensation is owed, in order to eliminate incentives to pursue new arbitrage opportunities. In sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users, consistent with the tentative conclusion in the *NPRM* that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic. In this regard, we emphasize that the rate caps we impose are not intended to reflect the costs incurred by each carrier that delivers ISP traffic. Some carriers' costs may be higher; some are probably lower. Rather, we conclude, based upon all of the evidence in this record, that these rates are appropriate limits on the amounts recovered from other carriers and provide a reasonable transition from rates that have (at least until recently) typically been much higher. Carriers whose costs exceed these rates are (and will continue to be) able to collect additional amounts from their ISP customers. As we note above, and explain in more detail below, we believe that such end-user recovery likely is the most efficient mechanism.

8. The basic structure of this transition is as follows:

- Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be capped at a rate of $.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at $.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at $.0007/mou. Any additional costs incurred must be recovered from end-users. These rates reflect the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements, suggesting that they are sufficient to provide a reasonable transition from dependence on intercarrier payments while ensuring cost recovery.

- We also impose a cap on total ISP-bound minutes for which a local exchange carrier (LEC) may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the 2002 ceiling. These caps are consistent with projections of the growth of dial-up Internet access for the first two years of the transition and are necessary to ensure that such growth does not

undermine our goal of limiting intercarrier compensation and beginning a transition toward bill and keep. Growth above these caps should be based on a carrier's ability to provide efficient service, not on any incentive to collect intercarrier payments.

- Because the transitional rates are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.

- In order to limit disputes and costly measures to identify ISP-bound traffic, we adopt a rebuttable presumption that traffic exchanged between LECs that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation mechanism set forth in this Order. This ratio is consistent with those adopted by state commissions to identify ISP or other convergent traffic that is subject to lower intercarrier compensation rates. Carriers that seek to rebut this presumption, by showing that traffic above the ratio is not ISP-bound traffic or, conversely, that traffic below the ratio is ISP-bound traffic, may seek appropriate relief from their state commissions pursuant to section 252 of the Act.

- Finally, the rate caps for ISP-bound traffic (or such lower rates as have been imposed by states commissions for the exchange of ISP-bound traffic) apply only if an incumbent LEC offers to exchange

all traffic subject to section 251(b)(5) at the same rate. An incumbent LEC that does not offer to exchange section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal compensation rates reflected in their contracts. The record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the "mirroring" rule we adopt here requires that incumbent LECs pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

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3. ISP-Bound Traffic Falls within the Categories Enumerated in Section 251(g)

42. Having determined that section 251(g) serves as a limitation on the scope of "telecommunications" embraced by section 251(b)(5), the next step in our inquiry is to determine whether ISP-bound traffic falls within one or more of the categories specified in section 251(g): exchange access, information access, and exchange services for such access provided to IXCs and information service providers. Regardless of whether this traffic falls under the category of "exchange access" — an issue pending before the D.C. Circuit in a separate proceeding[11] — we conclude that this

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[11] *See Worldcom, Inc. v. FCC*, No. 00-1022 et al. (D.C. Cir.). In that proceeding, the Commission has argued that the category previously labeled "information access" under the MFJ is a subset of those services now falling under the category "exchange access" as set forth in section 3(16) of the Act, 47 U.S.C. 153(16), while incumbent LECs and others have argued that the two categories are mutually

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traffic, at a minimum, falls under the rubric of "information access," a legacy term imported into the 1996 Act from the MFJ, but not expressly defined in the Communications Act.

a. Background

43. Section 251(g) by its terms indicates that, in the provision of exchange access, information access, and exchange services for such access to IXCs and information service providers, various pre-existing requirements and obligations "including receipt of compensation" are preserved, whether these obligations stem from "any court order, *consent decree*, or regulation, order or policy of the Commission." (Emphasis added.) Similarly, in discussing this provision, the Joint Explanatory Statement of the Committee of Conference explicitly refers to preserving the obligations under the "AT&T Consent Decree."[12]

b. Discussion

44. We conclude that Congress's reference to "information access" in section 251(g) was intended to incorporate the meaning of the phrase "information access" as used in the AT&T Consent Decree.[13] The ISP-bound traffic at issue here falls within that category because it is

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exclusive. We need not reargue here whether "information access" is a subset of "exchange access" or whether instead they are mutually exclusive categories. The only issue relevant to our section 251(g) inquiry in this case is whether ISP-bound traffic falls, at a minimum, within the legacy category of "information access." Both the Commission and incumbent LECs have agreed that the access provided to ISPs satisfies the definition of information access.

[12] *Joint Explanatory Statement of the Committee of Conference*, S. Conf. Rep. No. 230, 104th Cong., 2d Session at 123 (February 1, 1996).

[13] *United States v. AT&T*, 552 F. Supp. at 196, 229.

traffic destined for an information service provider.[14] Under the consent decree, "information access" was purchased by "information service providers" and was defined as "the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services."[15] We conclude that this definition of "information access" was meant to include all access traffic that was routed by a LEC "to or from" providers of information services, of which ISPs are a subset.[16] The record in this proceeding also supports our interpretation.[17] When Congress passed the 1996 Act, it

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[14] *See* Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000)(stating that section 251(g) applies by its very terms to "information access").

[15] *United States v. AT&T*, 552 F. Supp. at 196, 229.

[16] This finding is consistent with our past statements on the issue. In the *Non-Accounting Safeguards Order*, we found that the access that LECs provide to enhanced service providers, including ISPs, constitutes "information access" as the MFJ defines that term. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22024 & n.621 (1996). Although we subsequently overruled our statement in that order that ISPs do not also purchase "exchange access" under section 3(16), we have not altered our finding that the access provided to enhanced service providers (including ISPs) is "information access." *Advanced Services Remand Order*, 15 FCC Rcd at 404-05.

[17] *See, e.g.*, Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000). Some have argued that "information access" includes only certain specialized functions unique to the needs of enhanced service providers and does not include basic telecommunications links used to provide enhanced service providers with access to the LEC network. *See, e.g.*, Brief of WorldCom, Inc., D.C. Circuit No. 00-1002, *et al.*, filed Oct. 3, 2000, at 16 n.12. The MFJ definition of information access, however,

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adopted new terminology. The term "information access" is not, therefore, part of the new statutory framework. Because the legacy term "information access" in section 251(g) encompasses ISP-bound traffic, however, this traffic is excepted from the scope of the "telecommunications" subject to reciprocal compensation under section 251(b)(5).

* * * * * *

2. Intercarrier Compensation for ISP-bound Traffic

77. We believe that a hybrid mechanism that establishes relatively low per minute rates, with a cap on the total volume of traffic entitled to such compensation, is the most appropriate interim approach over the near term to resolve the problems associated with the current intercarrier compensation regime for ISP-bound traffic. Our primary goal at this time is to address the market distortions under

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includes the telecommunications links used for the "origination, termination, [and] transmission" of information services, *and* "*where necessary*, the provision of network signalling" and other functions. *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). Others have argued that the "information access" definition engrafts a geographic limitation that renders this service category a subset of telephone exchange service. *See* Letter from Richard Rindler, Swindler, Berlin, to Magalie Roman Salas, Secretary, FCC, at 3 (Apr. 12, 2001). We reject that strained interpretation. Although it is true that "information access" is necessarily initiated "in an exchange area," the MFJ definition states that the service is provided "*in connection with* the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services" *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). Significantly, the definition does not further require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.

the current intercarrier compensation regimes for ISP-bound traffic. At the same time, we believe it prudent to avoid a "flash cut" to a new compensation regime that would upset the legitimate business expectations of carriers and their customers. Subsequent to the Commission's Declaratory Ruling, many states have required the payment of reciprocal compensation for ISP-bound traffic, and CLECs may have entered into contracts with vendors or with their ISP customers that reflect the expectation that the CLECs would continue to receive reciprocal compensation revenue. We believe it appropriate, in tailoring an interim compensation mechanism, to take those expectations into account while simultaneously establishing rates that will produce more accurate price signals and substantially reduce current market distortions. Therefore, pending our consideration of broader intercarrier compensation issues in the NPRM, we impose an interim intercarrier compensation regime for ISP-bound traffic that serves to limit, if not end, the opportunity for regulatory arbitrage, while avoiding a market-disruptive "flash cut" to a pure bill and keep regime. The interim regime we establish here will govern intercarrier compensation for ISP-bound traffic until we have resolved the issues raised in the intercarrier compensation NPRM.

78. Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be capped at a rate of $.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at $.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at $.0007/mou. In addition to the rate caps, we will impose a cap on total ISP-bound minutes for which a LEC may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection

agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that agreement in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement.

79. We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in this Order. Using a rebuttable presumption in this context is consistent with the approach that numerous states have adopted to identify ISP-bound traffic or "convergent" traffic (including ISP traffic) that is subject to a lower reciprocal compensation rate. A carrier may rebut the presumption, for example, by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers. In that case, the state commission will order payment of the state-approved or state-arbitrated reciprocal compensation rates for that traffic. Conversely, if a carrier can demonstrate to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio, the state commission will relieve the originating carrier of reciprocal compensation payments for that traffic, which is

subject instead to the compensation regime set forth in this Order. During the pendency of any such proceedings, LECs remain obligated to pay the presumptive rates (reciprocal compensation rates for traffic below a 3:1 ratio, the rates set forth in this Order for traffic above the ratio), subject to true-up upon the conclusion of state commission proceedings.

80. We acknowledge that carriers incur costs in delivering traffic to ISPs, and it may be that in some instances those costs exceed the rate caps we adopt here. To the extent a LEC's costs of transporting and terminating this traffic exceed the applicable rate caps, however, it may recover those amounts from its own end-users. We also clarify that, because the rates set forth above are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives, and no such transition is necessary for carriers already exchanging traffic at rates below the caps. Moreover, those state commissions have concluded that, at least in their states, LECs receive adequate compensation from their own end-users for the transport and termination of ISP-bound traffic and need not rely on intercarrier compensation.

81. Finally, a different rule applies in the case where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served). In such a case, as of the effective date of this

Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period. We adopt this rule for several reasons. First, our goal here is to address and curtail a pressing problem that has created opportunities for regulatory arbitrage and distorted the operation of competitive markets. In so doing, we seek to confine these market problems to the maximum extent while seeking an appropriate long-term resolution in the proceeding initiated by the companion NPRM. Allowing carriers in the interim to expand into new markets using the very intercarrier compensation mechanisms that have led to the existing problems would exacerbate the market problems we seek to ameliorate. For this reason, we believe that a standstill on any expansion of the old compensation regime into new markets is the more appropriate interim answer. Second, unlike those carriers that are presently serving ISP customers under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans.

82. The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this same reason, as of the date this Order is published in the Federal Register, carriers may no longer

invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. Section 252(i) applies only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201.

83. This interim regime satisfies the twin goals of compensating LECs for the costs of delivering ISP-bound traffic while limiting regulatory arbitrage. The interim compensation regime, as a whole, begins a transition toward what we have tentatively concluded, in the companion NPRM, to be a more rational cost recovery mechanism under which LECs recover more of their costs from their own customers. This compensation mechanism is fully consistent with the manner in which the Commission has directed incumbent LECs to recover the costs of serving ESPs, including ISPs. The three-year transition we adopt here ensures that carriers have sufficient time to re-order their business plans and customer relationships, should they so choose, in light of our tentative conclusions in the companion NPRM that bill and keep is the appropriate long-term intercarrier compensation regime. It also affords the Commission adequate time to consider comprehensive reform of all intercarrier compensation regimes in the NPRM and any resulting rulemaking proceedings. Both the rate caps and the volume limitations reflect our view that LECs should begin to formulate business plans that reflect decreased reliance on revenues from intercarrier compensation, given the trend toward substantially lower rates and the strong possibility that the NPRM may result in the adoption of a full bill and keep regime for ISP-bound traffic.

84. We acknowledge that there is no exact

science to setting rate caps to limit carriers' ability to draw revenue from other carriers, rather than from their own end-users. Our adoption of the caps here is based on a number of considerations. First, rates that produce meaningful reductions in intercarrier payments for ISP-bound traffic must be at least as low as rates in existing interconnection agreements. Second, although we make no finding here regarding the actual costs incurred in the delivery of ISP-bound traffic, there is evidence in the record to suggest that technological developments are reducing the costs incurred by carriers in handling all sorts of traffic, including ISP-bound traffic. Third, although the process has proceeded too slowly to address the market distortions discussed above, we note that negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new interconnection agreements. Finally, CLECs have been on notice since the 1999 Declaratory Ruling that it might be unwise to rely on the continued receipt of reciprocal compensation for ISP-bound traffic, thus many have begun the process of weaning themselves from these revenues.

85. The rate caps adopted herein reflect all these considerations. The caps we have selected approximate the downward trend in intercarrier compensation rates reflected in recently negotiated interconnection agreements. In these agreements, carriers have agreed to rates, like those we adopt here, that decline each year of a three-year contract term, and at least one agreement reflects different rates for balanced and unbalanced traffic. For example, the initial rate cap of $.0015/mou approximates the rates applicable this year in agreements Level 3 has negotiated with Verizon and SBC. The $.0010/mou rate that applies during most of the three-year interim period reflects a proposal by ALTS, the trade association representing CLECs, for a transition plan pursuant to which intercarrier compensation payments for ISP-bound traffic would decline to $.0010/mou.

Similarly, the $.0007/mou rate reflects the average rate applicable in 2002 under Level 3's agreement with SBC. We conclude, therefore, that the rate caps constitute a reasonable transition toward the recovery of costs from end-users.

86. We impose an overall cap on ISP-bound minutes for which compensation is due in order to ensure that growth in dial-up Internet access does not undermine our efforts to limit intercarrier compensation for this traffic and to begin, subject to the conclusion of the NPRM proceedings, a smooth transition toward a bill and keep regime. A ten percent growth cap, for the first two years, seems reasonable in light of CLEC projections that the growth of dial-up Internet minutes will fall in the range of seven to ten percent per year. We are unpersuaded by the ILECs' projections that dial-up minutes will grow in the range of forty percent per year, but adoption of a cap on growth largely moots this debate. If CLECs have projected growth in the range of ten percent, then limiting intercarrier compensation at that level should not disrupt their customer relationships or their business planning. Nothing in this Order prevents any carrier from serving or indeed expanding service to ISPs, so long as they recover the costs of additional minutes from their ISP customers. The caps merely ensure that growth in minutes above the caps is based on a given carrier's ability to provide efficient and quality service to ISPs, rather than on a carrier's desire to reap an intercarrier compensation windfall.

87. We are not persuaded by arguments proffered by CLECs that requiring them to recover more of their costs from their ISP customers will render it impossible for CLECs profitably to serve ISPs or will lead to higher rates for Internet access. First, as noted above, this compensation mechanism is fully consistent with the manner in which this

Commission has directed ILECs to recover the costs of serving ISPs. Moreover, the evidence in the record does not demonstrate that CLECs cannot compete for ISP customers in the growing number of states that have adopted bill and keep for ISP-bound traffic or that the cost of Internet access has increased in those states. Second, next-generation switching and other technological developments appear to be contributing to a decline in the costs of serving ISPs (and other customers). Third, if reciprocal compensation merely enabled CLECs to recover the costs of serving ISPs, CLECs should be indifferent between serving ISPs and other customers. Instead, CLECs have not contradicted ILEC assertions that more than ninety percent of CLEC reciprocal compensation billings are for ISP-bound traffic, suggesting that there may be a considerable margin between current reciprocal compensation rates and the actual costs of transport and termination. Finally, there is reason to believe that our failure to act, rather than the actions we take here, would lead to higher rates for Internet access, as ILECs seek to recover their reciprocal compensation liability, which they incur on a minute-of-use basis, from their customers who call ISPs. Alternatively, ILECs might recover these costs from all of their local customers, including those who do not call ISPs. There is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access.

88. We also are not convinced by the claim of CLECs that limiting intercarrier compensation for ISP-bound traffic will result in a windfall for the incumbent LECs. The CLECs argue that the incumbents' local rates are set to recover the costs of originating and terminating calls and that the ILECs avoid termination costs when their end-users call ISP customers served by CLECs. The record does not establish that ILECs necessarily avoid costs when

they deliver calls to CLECs, and CLECs have not demonstrated that ILEC end-user rates are designed to recover from the originating end-user the costs of delivering calls to ISPs. The ILECs point out that, in response to their complaints about the costs associated with delivering traffic to ISPs, the Commission has directed them to seek permission from state regulators to raise the rates they charge the ISPs, an implicit acknowledgement that ILECs may not recover all of their costs from the originating end-user.

* * * * * *

VI. ORDERING CLAUSES

112. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-209, 251, 252, 332, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 251, 252, 332, and 403, and Section 553 of Title 5, United States Code, 5 U.S.C. § 553, that this Order on Remand and Report and Order and revisions to Part 51 of the Commission's rules, 47 C.F.R. Part 51, ARE ADOPTED. This Order on Remand and Report and Order and the rule revisions adopted herein will be effective 30 days after publication in the Federal Register except that, for good cause shown, as set forth in paragraph 82 of this Order, the provision of this Order prohibiting carriers from invoking section 252(i) of the Act to opt into an existing interconnection agreement as it applies to rates paid for the exchange of ISP-bound traffic will be effective immediately upon publication of this Order in the Federal Register.

113. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order on Remand and Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for

Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Bell Atlantic Telephone Companies, Petitioner v. Federal Communications Commission and United States of America, Respondents; Telecommunications Resellers Association, *et al.*, Intervenors

No. 99-1094, Consolidated with 99-1095, 99-1097, 99-1106, 99-1126, 99-1134, 99-1136, 99-1145

United States Court of Appeals for the District of Columbia Circuit

340 U.S. App. D.C. 328; 206 F.3d 1; 2000 U.S. App. LEXIS 4685; 19 Comm. Reg. (P & F) 1269

November 22, 1999, Argued
March 24, 2000, Decided

WILLIAMS, Circuit Judge: The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151-714, requires local exchange carriers ("LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Id. § 251(b)(5). When LECs collaborate to complete a call, this provision ensures compensation both for the originating LEC, which receives payment from the end-user, and for the recipient's LEC. By regulation the Commission has limited the scope of the reciprocal compensation requirement to "local telecommunications traffic." 47 CFR § 51.701(a). In the ruling under review, it considered whether calls to internet service providers ("ISPs") within the caller's local calling area are themselves "local." In doing so it applied its so-called "end-to-end" analysis, noting that the communication characteristically will ultimately (if indirectly) extend beyond the ISP to websites out-of-state and around the world. Accordingly it found the calls non-local. *See In the Matter of Implementation of the Local*

Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, 3690 (¶ 1) (1999) ("*FCC Ruling*").

Having thus taken the calls to ISPs out of § 251(b)(5)'s provision for "reciprocal compensation" (as it interpreted it), the Commission could nonetheless itself have set rates for such calls, but it elected not to. In a Notice of Proposed Rulemaking, CC Docket 99-68, the Commission tentatively concluded that "a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation," *FCC Ruling*, 14 FCC Rcd at 3707 (¶ 29), but for the nonce it left open the matter of implementing a system of federal controls. It observed that in the meantime parties may voluntarily include reciprocal compensation provisions in their interconnection agreements, and that state commissions, which have authority to arbitrate disputes over such agreements, can construe the agreements as requiring such compensation; indeed, even when the agreements of interconnecting LECs include no linguistic hook for such a requirement, the commissions can find that reciprocal compensation is appropriate. *FCC Ruling*, 14 FCC Rcd at 3703-05 (¶¶ 24-25); see § 251(b)(1) (establishing such authority). "Any such arbitration," it added, "must be consistent with governing federal law." *FCC Ruling*, 14 FCC Rcd at 3705 (¶ 25).

This outcome left at least two unhappy groups. One, led by Bell Atlantic, consists of incumbent LECs (the "incumbents"). Quite content with the Commission's finding of § 251(b)(5)'s inapplicability, the incumbents objected to its conclusion that in the absence of federal regulation state commissions have the authority to impose reciprocal compensation. Although the Commission's new rulemaking on the subject may eventuate in a rule that preempts the states' authority, the incumbents object to

being left at the mercy of state commissions until that (hypothetical) time, arguing that the commissions have mandated exorbitant compensation. In particular, the incumbents, who are paid a flat monthly fee, have generally been forced to provide compensation for internet calls on a per-minute basis. Given the average length of such calls the cost can be substantial, and since ISPs do not make outgoing calls, this compensation is hardly "reciprocal."

Another group, led by MCI WorldCom, consists of firms that are seeking to compete with the incumbent LECs and which provide local exchange telecommunications services to ISPs (the "competitors"). These firms, which stand to receive reciprocal compensation on ISP-bound calls, petitioned for review with the complaint that the Commission erred in finding that the calls weren't covered by § 251(b)(5).

The end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction. Here it used the analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations. Because of this gap, we vacate the ruling and remand the case for want of reasoned decisionmaking.

* * *

In February 1996 Congress passed the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), stating an intent to open local telephone markets to competition. See H.R. Conf. Rep. No. 104-458, at 113 (1996). Whereas before local exchange carriers generally had state-licensed monopolies in each local service area, the 1996 Act set out to ensure that "states may no longer enforce laws that impede[ ] competition," and subjected incumbent

LECs "to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 726, 142 L. Ed. 2d 834 (1999).

Among the duties of incumbent LECs is to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2). ("Telephone exchange service" and "exchange access" are words of art to which we shall later return.) Competitor LECs have sprung into being as a result, and their customers call, and receive calls from, customers of the incumbents.

We have already noted that § 251(b)(5) of the Act establishes the duty among local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Thus, when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call, a cost usually paid on a per-minute basis. Although § 251(b)(5) purports to extend reciprocal compensation to all "telecommunications," the Commission has construed the reciprocal compensation requirement as limited to local traffic. *See* 47 CFR § 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers."). LECs that originate or terminate long-distance calls continue to be compensated with "access charges," as they were before the 1996 Act. Unlike reciprocal compensation, these access charges are not paid by the originating LEC. Instead, the long-distance carrier itself pays both the LEC that originates the call and links the caller to the long distance network, and the LEC that

terminates the call. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 (¶ 1034) (1996) ("*Local Competition Order*").

The present case took the Commission beyond these traditional telephone service boundaries. The internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." *Reno v. ACLU*, 521 U.S. 844, 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997). Unlike the conventional "circuit-switched network," which uses a single end-to-end path for each transmission, the internet is a "distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." *In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11532 (¶ 64) (1998) ("*Universal Service Report*"). ISPs are entities that allow their customers access to the internet. Such a customer, an "end user" of the telephone system, will use a computer and modem to place a call to the ISP server in his local calling area. He will usually pay a flat monthly fee to the ISP (above the flat fee already paid to his LEC for use of the local exchange network). The ISP "typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls." *FCC Ruling*, 14 FCC Rcd at 3691 (¶ 4).

In the ruling now under review, the Commission concluded that § 251(b)(5) does not impose reciprocal compensation requirements on incumbent LECs for ISP-bound traffic. *FCC Ruling*, 14 FCC Rcd at 3690 (¶ 1). Faced with the question whether such traffic is "local" for

purposes of its regulation limiting § 251(b)(5) reciprocal compensation to local traffic, the Commission used the " end-to-end" analysis that it has traditionally used for jurisdictional purposes to determine whether particular traffic is interstate. Under this method, it has focused on "the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." *FCC Ruling*, 14 FCC Rcd at 3695 (¶ 10). We save for later an analysis of the various FCC precedents on which the Commission purported to rely in choosing this mode of analysis.

Before actually applying that analysis, the Commission brushed aside a statutory argument of the competitor LECs. They argued that ISP-bound traffic must be either "telephone exchange service," as defined in 47 U.S.C. § 153(47), or "exchange access," as defined in § 153(16).[18] It could not be the latter, they reasoned, because ISPs do not assess toll charges for the service (*see id.*, "the offering of access ... for the purpose of the origination or termination of telephone toll services"), and therefore it must be the former, for which reciprocal compensation is mandated. Here the Commission's answer was that it has consistently

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18 "Telephone exchange service" is defined as:
(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. 47 U.S.C. § 153(47). "Exchange access" is defined as: the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. *Id.* § 153(16).

treated ISPs (and ESPs generally) as "users of access service," while treating them as end users merely for access charge purposes. *FCC Ruling*, 14 FCC Rcd at 3701 (¶ 17).

Having decided to use the "end-to-end" method, the Commission considered whether ISP-bound traffic is, under this method, in fact interstate. In a conventional "circuit-switched network," the jurisdictional analysis is straightforward: a call is intrastate if, and only if, it originates and terminates in the same state. In a "packet-switched network," the analysis is not so simple, as "an Internet communication does not necessarily have a point of 'termination' in the traditional sense." *FCC Ruling*, 14 FCC Rcd at 3701-02 (¶ 18). In a single session an end user may communicate with multiple destination points, either sequentially or simultaneously. Although these destinations are sometimes intrastate, the Commission concluded that "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Id.* Thus reciprocal compensation was not due, and the issue of compensation between the two local LECs was left initially to the LECs involved, subject to state commissions' power to order compensation in the "arbitration" proceedings, and, of course to whatever may follow from the Commission's new rulemaking on its own possible ratesetting.

* * *

The issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly. The Commission has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other, as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the

LECs. *See Local Competition Order*, 11 FCC Rcd at 16013 (¶ 1034) (1996).

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP. The Commission's ruling rests squarely on its decision to employ an end-to-end analysis for purposes of determining whether ISP traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

In fact, the extension of "end-to-end" analysis from jurisdictional purposes to the present context yields intuitively backwards results. Calls that are jurisdictionally intrastate will be subject to the federal reciprocal compensation requirement, while calls that are interstate are not subject to federal regulation but instead are left to potential state regulation. The inconsistency is not necessarily fatal, since under the 1996 Act the Commission has jurisdiction to implement such provisions as § 251, even if they are within the traditional domain of the states. *See AT&T Corp.*, 119 S. Ct. at 730. But it reveals that arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context.

In attacking the Commission's classification of ISP-bound calls as non-local for purposes of reciprocal

compensation, MCI WorldCom notes that under 47 CFR § 51.701(b)(1) "telecommunications traffic" is local if it " originates and terminates within a local service area." But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its definition of "termination," namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." *Local Competition Order*, 11 FCC Rcd at 16015 (¶ 1040); 47 CFR § 51.701(d). Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

In its ruling the Commission avoided this result by analyzing the communication on an end-to-end basis: "The communications at issue here do not terminate at the ISP's local server ..., but continue to the ultimate destination or destinations." *FCC Ruling*, 14 FCC Rcd at 3697 (¶ 12). But the cases it relied on for using this analysis are not on point. Both involved a single continuous communication, originated by an end-user, switched by a long-distance communications carrier, and eventually delivered to its destination. *One, Teleconnect Co. v. Bell Telephone Co.*, 10 FCC Rcd 1626 (1995), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 325 U.S. App. D.C. 249, 116 F.3d 593 (D.C. Cir. 1997) ("*Teleconnect*"), involved an 800 call to a long-distance carrier, which then routed the call to its intended recipient. The other, *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the Bell-South Corporation*, 7 FCC Rcd 1619 (1992), considered a voice mail service. Part of the service, the forwarding of the call from the intended recipient's location to the voice mail apparatus and service, occurred entirely within the subscriber's state, and thus looked local. Looking "end-to-end," however, the Commission refused to focus on this

portion of the call but rather considered the service in its entirety (*i.e.*, originating with the out-of-state caller leaving a message, or the subscriber calling from out-of-state to retrieve messages). *Id.* at 1621 (¶ 12).

ISPs, in contrast, are "information service providers," *Universal Service Report*, 13 FCC Rcd at 11532-33 (¶ 66), which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. The Commission acknowledged in a footnote that the cases it relied upon were distinguishable, but dismissed the problem out-of-hand: "Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that 'it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs," *Access Charge Reform Order*, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis." *FCC Ruling*, 14 FCC Rcd at 3697 n.36 (¶ 12). It is not clear how this helps the Commission. Even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).

In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communication services to provide their goods or services to their customers. Comments of WorldCom, Inc. at 7 (July 17, 1997). Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit

card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users." *Id.*

The Commission nevertheless argues that although the call from the ISP to an out-of-state website is information service for the end-user, it is telecommunications for the ISP, and thus the telecommunications cannot be said to "terminate" at the ISP. As the Commission states: "Even if, from the perspective of the end user as customer, the telecommunications portion of an Internet call 'terminates' at the ISP's server (and information service begins), the remaining portion of the call would continue to constitute telecommunications from the perspective of the ISP as customer." Commission's Br. at 41. Once again, however, the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP. However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

Adding further confusion is a series of Commission rulings dealing with a class, enhanced service providers ("ESPs"), of which ISPs are a subclass. *See FCC Ruling*, 14 FCC Rcd at 3689 n.1 (¶ 1). ESPs, the precursors to the 1996 Act's information service providers, offer data processing services, linking customers and computers via the telephone network. *See MCI Telecommunications Corp.*

v. FCC, 313 U.S. App. D.C. 51, 57 F.3d 1136, 1138 (D.C. Cir. 1995).[19] In its establishment of the access charge system for long-distance calls, the Commission in 1983 exempted ESPs from the access charge system, thus in effect treating them like end users rather than long-distance carriers. *See In the Matter of MTS & WATS Market Structure*, 97 F.C.C.2d 682, 711-15 (P 77-83) (1983). It reaffirmed this decision in 1991, explaining that it had "refrained from applying full access charges to ESPs out of concern that the industry has continued to be affected by a number of significant, potentially disruptive, and rapidly changing circumstances." *In the Matter of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4534 (P 54) (1991). In 1997 it again preserved the status quo. *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*"). It justified the exemption in terms of the goals of the 1996 Act, saying that its purpose was to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." *Id.* at 16133 (¶ 344) (quoting 47 U.S.C. § 230(b)(2)).

This classification of ESPs is something of an embarrassment to the Commission's present ruling. As MCI World-Com notes, the Commission acknowledged in the *Access Charge Reform Order* that "given the evolution in [information service provider] technologies and markets since we first established access charges in the early 1980s,

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[19] The regulatory definition states that ESPs offer "services ... which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR § 64.702(a).

it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs [inter-exchange carriers]." 12 FCC Rcd at 16133 (¶ 345). It also referred to calls to information service providers as "local." *Id.* at 16132 (¶ 342 n.502). And when this aspect of the *Access Charge Reform Order* was challenged in the 8th Circuit, the Commission's briefwriters responded with a sharp differentiation between such calls and ordinary long-distance calls covered by the "end-to-end" analysis, and even used the analogy employed by MCI WorldCom here — that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need. Brief of FCC at 76, *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998) (No. 97-2618). When accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." *FCC Ruling*, 14 FCC Rcd at 3700 (¶ 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.

Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983); 5 U.S.C. § 706(2)(A), we must vacate the ruling and remand the case.

There is an independent ground requiring remand — the fit of the present rule within the governing statute. MCI

WorldCom says that ISP-traffic is "telephone exchange service[]" as defined in 47 U.S.C. § 153(16), which it claims "is synonymous under the Act with the service used to make local phone calls," and emphatically not "exchange access" as defined in 47 U.S.C. § 153(47). Petitioner MCI WorldCom's Initial Br. at 22. In the only paragraph of the ruling in which the Commission addressed this issue, it merely stated that it "consistently has characterized ESPs as 'users of access service' but has treated them as end users for pricing purposes." *FCC Ruling*, 14 FCC Rcd at 3701 (¶ 17). In a statutory world of "telephone exchange service" and "exchange access," which the Commission here says constitute the only possibilities, the reference to "access service," combining the different key words from the two terms before us, sheds no light. "Access service" is in fact a pre-Act term, defined as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 CFR § 69.2(b).

If the Commission meant to place ISP-traffic within a third category, not "telephone exchange service" and not "exchange access," that would conflict with its concession on appeal that "exchange access" and "telephone exchange service" occupy the field. But if it meant that just as ESPs were "users of access service" but treated as end users for pricing purposes, so too ISPs are users of exchange access, the Commission has not provided a satisfactory explanation why this is the case. In fact, in *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22023 (¶ 248) (1996), the Commission clearly stated that "ISPs do not use exchange access." After oral argument in this case the Commission overruled this determination, saying that "non-carriers may be purchasers of those services." *In the Matter of Deployment of Wireline Services Offering Advanced*

Telecommunications Capability, FCC 99-413, at 21 (¶ 43) (Dec. 23, 1999). The Commission relied on its pre-Act orders in which it had determined that non-carriers can use "access services," and concluded that there is no evidence that Congress, in codifying "exchange access," intended to depart from this understanding. *See id.* at 21-22 (¶ 44). The Commission, however, did not make this argument in the ruling under review.

Nor did the Commission even consider how regarding noncarriers as purchasers of "exchange access" fits with the statutory definition of that term. A call is "exchange access" if offered "for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). As MCI WorldCom argued, ISPs provide information service rather than telecommunications; as such, "ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll services." Petitioner MCI WorldCom's Reply Br. at 6.

The statute appears ambiguous as to whether calls to ISPs fit within "exchange access" or "telephone exchange service," and on that view any agency interpretation would be subject to judicial deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). But, even though we review the agency's interpretation only for reasonableness where Congress has not resolved the issue, where a decision "is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service." *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 87 L. Ed. 626, 63 S. Ct. 454 (1943). *See also Acme Die Casting v. NLRB*, 307 U.S. App. D.C. 21, 26 F.3d 162, 166 (D.C. Cir. 1994); *Leeco, Inc. v. Hays*, 296 U.S. App. D.C. 119, 965 F.2d 1081, 1085 (D.C. Cir. 1992); *City of Kansas*

City v. Department of Housing and Urban Development, 287 U.S. App. D.C. 365, 923 F.2d 188, 191-92 (D.C. Cir. 1991).

* * *

Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminating ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs — that § 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

So ordered.

Supreme Court, U.S.
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NO. 02-980

IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CORE COMMUNICATIONS, INC.,

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RESPONSE IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

Respondents Focal Communications Corporation, Pac-West Telecomm, Inc., RCN Telecom Services, Inc., Starpower Communications, LLC, and US LEC Corp. (collectively, "Competitive Local Telephone Companies"), each of whom were Appellant-Intervenors in the proceeding below, hereby submit their Response in Support of the Petition for Writ of Certiorari filed by Core Communications, Inc. ("CoreTel") on December 23, 2002. CoreTel petitioned for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2000). The Court should grant the writ requested by CoreTel because the *WorldCom* decision conflicts with relevant decisions of this Court. In addition, CoreTel raises an important question of federal law that has not been, but should be, settled by this Court.

Although the case at the D.C. Circuit arose under the Communications Act of 1934, as amended by the

Telecommunications Act of 1996 (the "Telecom Act"), the question presented for review is not related to the Telecom Act. Instead, the question presented is one related solely to administrative law, and more specifically, to federal court supervision of federal agencies. At bottom, this case deals with a federal court's choice of remedy on the review of a decision of a federal agency. Specifically, at issue here is the decision of the D.C. Circuit, upon reviewing a decision of the Federal Communications Commission ("FCC"), and after rejecting the statutory foundation on which the decision was based, to remand the decision to the agency without also vacating or reversing it. The Court should grant the writ of certiorari in order to review this decision and vacate the decision under review. The Competitive Local Telephone Companies submit this Response in Support to supplement the arguments asserted by CoreTel for granting the writ of certiorari.

BACKGROUND

As CoreTel explained in its Petition, in February 1999 the FCC released a *Declaratory Ruling* in which it stated that section 251(b)(5) of the Telecom Act, 47 U.S.C. § 251(b)(5), did not require the payment of "reciprocal compensation" for calls to the local telephone number of an Internet service provider ("ISP"). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*"). In March 2000, the D.C. Circuit vacated and remanded the *Declaratory Ruling* for lack of reasoned decision-making. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir 2000). On remand in April 2001, the FCC issued an Order in response to the D.C. Circuit's *Bell Atlantic* decision, and also implemented a new, interim, prospective compensation mechanism for carriers that exchanged telephone calls to ISPs. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"). Several carriers appealed the FCC decision and the new, interim compensation mechanism.

In the *ISP Remand Order,* the FCC asserted that section 251(g) of the Telecom Act, 47 U.S.C. § 251(g), provided it with the authority to exclude ISP-bound traffic from the requirements of section 251(b)(5). The FCC then established an interim, intercarrier compensation mechanism under its general regulatory authority under section 201, 47 U.S.C. § 201. In May 2002, the D.C. Circuit rejected the view that section 251(g) provided the FCC with the authority it claimed to have. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). While rejecting the statutory basis for the *ISP Remand Order*, however, the D.C. Circuit did not vacate that *Order*, or the interim intercarrier compensation mechanism, which the Competitive Local Telephone Companies also had challenged. The panel observed that the FCC may be able to find some other statutory authority that would allow it to avoid application of section 251(b)(5) to ISP-bound traffic and implement its new compensation regime, which the FCC had not yet identified (and seven months later, still has not identified.)[1] Thus, the Competitive Local Telephone Companies and CoreTel were the prevailing parties on appeal, yet they were denied an adequate remedy when the D.C. Circuit elected not to undo the harms caused by the *ISP Remand Order*.

ARGUMENT

I. The Decision to Remand Without Vacatur Conflicts With Relevant Decisions of This Court

The Court should grant a writ of certiorari in this proceeding because the D.C. Circuit's decision to remand the *ISP Remand Order* to the FCC without also vacating it conflicts with relevant decisions of this Court. Review of this case is necessary to correct the error of the D.C. Circuit.

The Court's jurisprudence regarding the Administrative Procedure Act ("APA") is clear and unequivocal. "In *all* cases

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[1] Although not relevant to the issue presented in the CoreTel Petition, it is conceivable that the FCC does have authority to implement its interim compensation regime under its general regulatory authority. What it may not do, however, is impose a new regulatory regime based on statutory authority other than section 251(b)(5) without first explaining why the existing regulatory regime under section 251(b)(5) is not applicable to ISP-bound traffic.

agency action *must* be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971) (emphasis added). The Court has not wavered from that standard. When the D.C. Circuit found that the *ISP Remand Order* was "not in accordance with law," it was obligated to vacate the *Order*.

Further, a federal court may not impose additional procedural requirements than those established in the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202 (1978). Giving the FCC a third opportunity to identify a new statutory basis to exclude ISP-bound traffic from carriers' 251(b)(5) obligations, while keeping the illegally implemented rules and regulations in place, constitutes a procedural "mulligan" not permitted under the APA.

Finally, an agency decision stands or falls on the administrative record on which the agency relied in making its decision. *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244 (1973). If that decision is not sustainable on the administrative record, it must be vacated and remanded to the agency for further consideration. *Id.* The D.C. Circuit failed to adhere to this standard when it declined to vacate the *ISP Remand Order*, effectively permitting the FCC to generate a "post-hoc rationalization" that is prohibited by *Camp v. Pitts*. Because the D.C. Circuit found that the *ISP Remand Order* was not supportable on the legal grounds asserted by the FCC, the D.C. Circuit had no choice but to vacate and remand the decision to the FCC. The Court should grant CoreTel's Petition for Certiorari to correct the D.C. Circuit's error. *See* Prestes, Brian S., "Remanding Without Vacating Agency Action," 32 Seton Hall L. Rev. 108 (2001); Levin, Ronald M., "Vacation at Sea: Judicial Remands and the APA," 21-SPG Admin. & Reg. L. News 4 (1996).

II. Whether the United States Court of Appeals for the D.C. Circuit May Remand an Agency Decision Without Vacating It Is an Important and Unsettled Question of Federal Law.

Notwithstanding the clear instructions from this Court that agency action in violation of the APA must be set aside in all cases, the D.C. Circuit has fashioned an alternative remedy that preserves the unlawful agency action pending reconsideration by the agency. By remanding the *ISP Remand Order* without also vacating it, the D.C. Circuit has extended a practice of questionable legality that this Court should review.

In fact, the question is not even settled within the D.C. Circuit itself. Individual judges within the D.C. Circuit have recognized the questionable legality of the "remand without vacatur" practice. In 1993, the D.C. Circuit identified certain criteria to consider in determining whether a decision remanded to a federal agency should also be vacated. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993). The following year in *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), two judges engaged in a vigorous debate whether the "shall set aside" language from section 702 of the APA meant that all agency actions remanded by a reviewing court required vacatur. The prevailing view was that a decision could be remanded but not vacated when the agency has not adequately explained its position in order for the court to determine the lawfulness of the agency action. *Id.* at 462 (Silberman, J., concurring). The minority view was that "[o]nce a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency's action." *Id.* 23 F.3d at 491 (Randolph, J. concurring). The D.C. Circuit subsequently stated that the issue raised in *Checkosky* had not yet been settled: "we do not reach the question raised and left undecided in *Checkosky* as to the validity of this precedent." *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1136 n.4 (D.C. Cir. 1995).

Even though the validity of remand without vacatur had not been decided, the D.C. Circuit has continued the practice. *See* Wu, Frank H., and Williams, Denisha S., "Remand Without

Reversal: An Unfortunate Habit," 30 Envtl. L. Rep. 10193 (2000). Nevertheless, at least one judge of the D.C. Circuit continues to believe that "remand without vacatur" violates the APA. In a recent dissenting opinion, Judge Sentelle endorsed the view of Judge Randolph in the *Checkosky* decision, and added to his argument: "*Heckler v. Chaney,* 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), among many other cases, establishes the proposition that courts are not to substitute their administrative judgments for those of the agency. . . . Therefore, when we hold that the conclusion [of the agency] heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting).

The crux of Judge Silberman's argument in *Checkosky* was that the APA is not necessarily violated when a reviewing court finds that an agency has not provided sufficient explanation for one of its actions. Judge Silberman contended that the court was unable to determine whether the agency had violated the APA because the agency had not explained itself adequately in order for the court to determine the basis for the agency action. *Checkosky*, 23 F.3d 452, 462 (D.C. Cir. 1994) (Silberman, J., concurring). Judge Silberman did not assert, however, that a reviewing court could find a violation of the APA and also remand an agency decision without also vacating it. Indeed, Judge Silberman recognized a distinction in those cases that warranted remand without vacatur from those that must be vacated: "In practice, the distinction—between a case where the reviewing court determines that the agency's explanation for its action is so crippled as to be unlawful and one where the court, unsure of the agency's reasoning, remands for a fuller explanation without expressing a view as to whether the agency's action is unlawful—is a matter of degree. But doctrinally the difference is enormous[.]" *Id.* at 464.

Yet the D.C. Circuit appeared to have no difficulty bridging this enormous doctrinal difference in *WorldCom* when the D.C. Circuit remanded the *ISP Remand Order* without also vacating it, even though the court determined that the FCC had erred as a matter of law by misreading the Telecom Act: "We agree with

petitioners that § 251(g) is not susceptible to the Commission's reading." *WorldCom* at 432. Further, "nothing in § 251(g) seems to invite the Commission's reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations." *Id.* at 433. Moreover, "§ 251(g) does not provide a basis for the Commission's action[.]" *Id.* at 434. Whatever the merits may be of remanding without vacatur under the circumstances of *Checkosky*, this case requires vacatur because the agency clearly erred as a matter of law.

III. Remand Without Vacatur Denies the Successful Litigant an Adequate Remedy

The Competitive Local Telephone Companies, in addition to numerous other competitors to the Regional Bell Operating Companies ("RBOC")and other incumbent local telephone companies, appealed the *ISP Remand Order* because the FCC grossly misinterpreted the provisions of the Telecom Act applicable to the dispute. These petitioners prevailed when the D.C. Circuit agreed that the FCC had erred. Nevertheless, the D.C. Circuit's decision to remand without vacating the *ISP Remand Order* effectively denies these successful appellants an adequate remedy.

The *ISP Remand Order* imposed a draconian and unnecessary "interim" compensation regime on the competitive industry. It is draconian because it literally closed off markets that were previously available to competitors, and capped the ability of competitive carriers to recover costs from the carriers that cause those costs. It is unnecessary because the justification that underlies it (calls to ISPs are not within carriers' section 251(b)(5) obligations) has been rejected. Although the FCC felt that the new interim compensation regime was necessary to prevent widespread "regulatory arbitrage" that it claimed existed prior to the *ISP Remand Order*, SBC Communications, Inc., the second-largest RBOC in the United States, serving more than 60 million access lines, never adopted the interim compensation regime after it became effective. *See* SBC Communications, Inc., Annual Report 2001, at 16 (Feb. 28, 2002) ("To date, none of our wireline subsidiaries have opted into the transition plan."),

http://www.sbc.com/investor_relations/company_reports_and_sec_filings/0,5931,136,00.html. Even though SBC prevailed at the FCC, SBC elected to maintain the status quo ante rather than comply with the requirements of the new interim compensation regime. SBC's conduct with respect to the new interim compensation regime proves that the new compensation regime was not necessary.

The prevailing appellants, including the Competitive Local Telephone Companies, are entitled to greater relief than that provided by the D.C. Circuit: "If a party has standing and prevails under its APA claim, it is entitled to a remedy under the statute, which normally will be a vacatur of the agency's order." *Andrx Pharmaceuticals, Inc. v. Biovail Corporation*, 276 F.3d 1368, 1379 (Fed. Cir. 2002); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). The Court should grant certiorari in order to review the action of the D.C. Circuit and provide the prevailing appellants with an adequate remedy.

IV. Remand Without Vacatur Constitutes an Evasion of the Requirements of *Bowen v. Georgetown University Hospital*

The Court should also grant the writ of certiorari because the "remand without vacatur" practice has mushroomed since the Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988). In *Georgetown*, the Court ruled that a decision from a federal agency following a remand from a federal court cannot be applied retroactively, without clear consent from Congress. The *Georgetown* decision thus laid bare a potential problem for administrative agencies: if their decisions were remanded and vacated following judicial review, there could be a gap in federal regulation until the agency issued a replacement rule in response to the remand instructions. This Court was presented with this argument by the federal agency in *Georgetown*: the Secretary of Health and Human Services asked to be allowed to issue "retroactive curative rulemaking" to cure the defect of a rule that had been invalidated by a court on review. *Id.* at 475. The Court declined to consider the issue because the applicable statutory scheme resolved the matter. . *Id.*

The D.C. Circuit has recognized that a decision not to vacate an agency order is a direct consequence of, and an attempt to avoid the implications of, the *Georgetown* decision. In *Allied-Signal,* the D.C. Circuit identified the criteria it considers when deciding whether to vacate a decision remanded to a federal agency. One of the criteria identified in *Allied-Signal* is the disruptive consequence of an interim change in federal regulation that may itself be changed when the agency issues its subsequent decision. *Id.* at 150-151. The D.C. Circuit specifically identified the consequences that the *Georgetown* decision would have on the Nuclear Regulatory Commission as sufficiently disruptive to warrant remand without vacatur. *Id.* at 151.

In *ICORE, Inc. v. FCC*, 985 F.2d 1075 (D.C. Cir. 1993), the D.C. Circuit addressed the relationship between remand without vacatur and the *Georgetown* decision. In support of an earlier decision remanding a decision to the FCC without vacating it, the D.C. Circuit rejected the argument that such conduct was prohibited by *Georgetown*. The D.C. Circuit recognized a distinction between "the use of retroactive rulemaking to cure a gap created by judicial vacatur of a rule" and "the judicial decision not to create such a gap." *Id.* at 1082. As long as the D.C. Circuit did not vacate the FCC decision, the reasoning goes, there is no problem with retroactive rulemaking that violated *Georgetown*.

The *ICORE* and *Allied-Signal* decisions represent an overt effort to evade the implications of *Georgetown*. Whether such an approach is acceptable, or even lawful, has not been addressed by this Court. Absent a more direct statement from this Court, the D.C. Circuit does not have the authority to ignore the "shall set aside" language of the APA when an agency errs as a matter of law. The practical implications of the *Georgetown* decision cannot supersede the plain language of the APA.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit as requested by Core Communications, Inc.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had the discretion under the Administrative Procedure Act to remand an agency decision without vacating that decision.

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In the Supreme Court of the United States

No. 02-980

CORE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 288 F.3d 429. The order of the Federal Communications Commission (excerpted at Pet. App. 14a-37a) is reported at 16 F.C.C.R. 9151.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2002. A petition for rehearing was denied on September 24, 2002 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on December 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress sought in the Telecommunications Act of 1996 (1996 Act), 47 U.S.C. 251 *et seq.*, to open local telecommunications markets to competition. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). To further that purpose, the 1996 Act imposes certain duties on all local carriers (sometimes referred to as LECs) and additional duties on incumbent carriers (sometimes referred to as ILECs). One of the duties imposed on all local carriers is "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). This case arises out of a challenge to the rules promulgated by the Federal Communications Commission (FCC) to implement that duty.

Reciprocal compensation arrangements address the situation in which the party who places a call and the party who receives that call are customers of different local carriers. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C.R. 9151, 9158 (2001) (*ISP Remand Order*). Each carrier incurs costs in transmitting and terminating the call. Ordinarily, reciprocal compensation mechanisms require the calling party's carrier to compensate the called party's carrier on the theory that the calling party "causes" those costs. See *id.* at 9182 n.129.

For traditional voice calls, a carrier can expect that its customers, in the aggregate, will make approximately as many calls as they receive (generally measured in terms of total minutes of calling). See *ISP Remand Order*, 16 F.C.C.R. at 9162, 9182. Calling patterns changed in the 1990s, however, as a result of the increased use of the Internet. Internet service

providers (ISPs) began to lease local telephone lines to enable their customers to connect to the Internet by dialing a local telephone number. See *id.* at 9157-9158, 9178. As ISPs gained customers, calls to ISPs grew dramatically in number and duration. See *id.* at 9162. At the same time, ISPs made few, if any, local calls themselves. See *id.* at 9183. As a consequence, when one of the local carriers in a community predominantly has ISPs as customers, that carrier ordinarily receives far more in reciprocal compensation than it pays. See *id.* at 9182-9183.

This phenomenon has given competing (*i.e.*, non-incumbent) carriers an "enormous incentive" to seek out ISP customers. *ISP Remand Order*, 16 F.C.C.R. at 9183. The FCC has found that competing carriers receive, on average, 18 times more traffic than they send, resulting in reciprocal compensation billings of approximately $2 billion a year, 90% of which is for ISP-bound calls. See *ibid.* Indeed, the FCC has found that many competing carriers have "target[ed] ISPs in large part because of the availability of reciprocal compensation payments," and that some ISPs have sought to become carriers "to share in the reciprocal compensation windfall." *Ibid.*

2. The FCC first addressed the question of reciprocal compensation for dial-up Internet traffic in a 1999 declaratory ruling. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 F.C.C.R. 3689 (1999). The FCC concluded that dial-up Internet traffic was "largely interstate" in nature because, under FCC precedents, such traffic terminates not at the ISP, but at websites that generally are not located in the calling party's State. See *id.* at 3690, 3701-3702. Because the FCC had previously held that Section 251(b)(5), the reciprocal

compensation provision of the 1996 Act, applied only to "local" calls, the FCC concluded that Section 251(b)(5) did not apply to compensation for this "largely interstate" traffic. *Id.* at 3689-3990. The FCC initiated a rulemaking proceeding to consider what compensation mechanism it should adopt for dial-up Internet traffic. See *id.* at 3707-3710. As an interim measure, the FCC stated that incumbent and competing carriers could agree on how to compensate each other for such traffic and that state public utility commissions could establish appropriate compensation mechanisms in arbitration proceedings conducted under 47 U.S.C. 252. See 14 F.C.C.R. at 3703-3705.

The court of appeals vacated the declaratory ruling and remanded the case to the FCC. Pet. App. 38a-53a. The court did not dispute the FCC's determination that, because most dial-up Internet traffic terminates at out-of-state websites, such traffic is jurisdictionally interstate and thereby subject to federal regulation. See *id.* at 45a. The court held, however, that the FCC's jurisdictional determination did not necessarily resolve whether such traffic is eligible for reciprocal compensation under Section 251(b)(5). See *id.* at 45a-48a. In addition, the court faulted the FCC for failing to consider how dial-up Internet traffic fits within the statutory definitions of "telephone exchange service" (which generally describes local calling services, see 47 U.S.C. 153(47)) and "exchange access" (which is a service that local carriers provide to, among others, interexchange (*i.e.*, long-distance) carriers, see 47 U.S.C. 153(16)). Pet. App. 51a-52a. Because the FCC had stated that all calls must fall within one of those categories, the court held that the FCC should have assigned dial-up Internet traffic to a category. See *id.* at 51a.

3. On remand, the FCC concluded that Section 251(b)(5), by its terms, requires local carriers to establish reciprocal compensation arrangements for all "telecommunications." *ISP Remand Order*, 16 F.C.C.R. at 9165-9166. The FCC concluded, however, that Section 251(b)(5) is limited by Section 251(g), which generally preserves local carriers' pre-1996 Act obligations to "provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers," such as ISPs, until that obligation is "explicitly superseded" by FCC regulations. 47 U.S.C. 251(g). The FCC concluded that dial-up Internet traffic "falls under the rubric of 'information access,'" and thus is exempt from Section 251(b)(5) until the FCC expressly removes the exemption. See 16 F.C.C.R. at 9168-9171.

After concluding that Section 251(g) exempts dial-up Internet traffic from Section 251(b)(5), the FCC reaffirmed its prior finding that most such traffic is "indisputably interstate in nature" and therefore subject to the FCC's regulatory authority under 47 U.S.C. 201. *ISP Remand Order*, 16 F.C.C.R. at 9178; see *id.* at 9175-9181. The FCC found that applying the reciprocal compensation regime to dial-up Internet traffic had resulted in "market distortions" that "undermine[] the operation of competitive markets" by interfering with "accurate price signals" and artificially encouraging competing carriers to serve ISPs exclusively or primarily. *Id.* at 9182-9186. The FCC proposed to address the problem by adopting a "bill-and-keep" model for dial-up Internet traffic under which each carrier would recover all of its costs of transmitting and terminating calls from its own customers. *Id.* at 9153 & n.6, 9184-9185. Thus, a carrier would recover its costs of serving

an ISP through the rates that the carrier charged the ISP. *Id.* at 9153 & n.6.

The FCC initiated a separate rulemaking proceeding to consider adopting a bill-and-keep model for all intercarrier compensation involving the local telephone network. *In re Developing a Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9611-9612 (2001). The FCC decided to await the completion of that proceeding before adopting bill-and-keep for dial-up Internet traffic alone. The FCC noted, however, that there was "a need for immediate action" to develop an interim compensation mechanism for such traffic in order to eliminate existing "arbitrage opportunities" and provide a transition to bill-and-keep. *ISP Remand Order*, 16 F.C.C.R. at 9155. The FCC adopted an interim mechanism that essentially caps (subject to certain annual adjustments) the number of compensable minutes and the per-minute compensation rate that a carrier may receive for dial-up Internet calls. See *id.* at 9187. In addition, a carrier entering a new local market is required to adopt bill-and-keep for dial-up Internet calls during the interim period. See *id.* at 9188. The FCC also determined that, because it had exercised its federal authority, state commissions could not regulate such traffic. See *id.* at 9189.

4. The court of appeals remanded the *ISP Remand Order*. Pet. App. 1a-9a. The court rejected the FCC's conclusion that Section 251(g) exempts dial-up Internet traffic from the Section 251(b)(5) obligation to establish reciprocal compensation arrangements. The court reasoned that Section 251(g) "provide[s] simply for the 'continued enforcement' of certain pre-[1996] Act regulatory" obligations, *id.* at 5a, and does not allow the FCC to "override virtually any provision of the 1996 Act" by promulgating rules that are "in some way,

however remote, linked to LECs' pre-Act obligations," *id.* at 7a. In addition, the court reasoned that Section 251(g) does not apply because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic" and, even if there had been, Section 251(g) preserves local carriers' obligations to inter-exchange carriers and information service providers, not to other local carriers. *Id.* at 7a-8a.

The court of appeals did not decide any other question presented in the case. The court specifically declined to decide whether dial-up Internet traffic involves "telephone exchange service," "exchange access," or potentially some other type of service. Pet. App. 8a. The court also declined to consider "the scope of the 'telecommunications' covered by" Section 251(b)(5) or "whether the [FCC] may adopt bill-and-keep for ISP-bound calls" pursuant to that provision. *Ibid.* In addition, the court did not decide whether the FCC's interim compensation mechanism was "inadequately reasoned," observing that, without knowing the content or legal basis for the FCC's "ultimate rules," it had "no meaningful context in which to assess these explicitly transitional measures." *Ibid.*

The court of appeals remanded the case to the FCC for further proceedings without vacating the *ISP Remand Order*. Pet. App. 8a-9a. In doing so, the court applied the standard articulated in *Allied-Signal, Inc.* v. *United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993), under which a decision whether to vacate depends on "the seriousness of the order's deficiencies" and "the disruptive consequences of an interim change that may itself be changed." Here, the court observed that "[m]any of the petitioners themselves favor bill-and-keep" and that "there is plainly a non-trivial likelihood" that the FCC has

authority to adopt a bill-and-keep system. Pet. App. 8a-9a. The court cited Section 251(b)(5) and Section 252(d)(2) as possible sources of such authority. *Ibid.*

ARGUMENT

Petitioner contends that Section 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. 706(2), required the court of appeals to vacate the *ISP Remand Order* and thereby void the interim compensation mechanism prescribed in that Order. Petitioner is mistaken. Although the APA provides that reviewing courts "shall * * * set aside" agency action that does not meet the standards set forth in Section 706(2), this Court has recognized that such language does not, without more, limit a court's traditional discretion to structure equitable remedies. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 328-330 (1944). Ordinarily, courts are "not mechanically obligated to grant [equitable relief] for every violation of law," but retain the authority to "mould each decree to the necessities of the particular case." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312-313 (1982). The application of that discretion to the facts of this particular case does not warrant review by this Court.

Moreover, this case does not actually frame the question presented in the petition—whether a court of appeals must vacate "rules held to have been promulgated without statutory authority" (Pet. i)—because the court of appeals did not hold that the FCC lacked statutory authority to adopt the rules at issue here. The decision in this case also does not conflict with the decision of any other court of appeals. To the extent that other circuits have considered whether Section 706(2) requires vacatur in all circumstances, they have

resolved the question consistently with the D.C. Circuit. The petition should therefore be denied.

1. Section 706(2) of the APA provides that a court "shall * * * hold unlawful and set aside agency action, findings, and conclusions" found to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2). That provision, properly understood, does not require courts to vacate each and every agency order that presents one of those deficiencies.

a. Vacatur is an equitable remedy. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). It is well-settled that limits on the judiciary's equitable discretion are not lightly presumed, see *Romero-Barcelo*, 456 U.S. at 313, and that "the bare fact of a statutory violation" does not compel injunctive relief, *id.* at 314. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Id.* at 313 (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)); accord *Hecht*, 321 U.S. at 329-330; cf. *Miller* v. *French*, 530 U.S. 327, 336-337 (2000) (when statute provided "automatic" stay until motion was acted upon, court did not have equitable discretion to "stay the stay"); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 173 (1978) (court was required to enjoin action that would harm endangered species in violation of Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*).

Although Section 706(2) uses the words "shall set aside" in describing the remedies available to courts in reviewing agency action under the APA, those words are insufficient to remove the courts' equitable discretion to remand an agency's order without vacating it.

In *Hecht*, the Court considered a provision of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*), that stated that, if a statutory violation had occurred or would occur, "a permanent or temporary injunction, restraining order, or other order shall be granted." 321 U.S. at 322. The Court explained that the phrase "shall be granted" was "less mandatory than a literal reading might suggest." *Id.* at 328. The Court construed the phrase *not* to impose "an absolute duty" to issue compliance orders "under any and all circumstances," but rather to grant authority to the courts to issue all appropriate equitable remedies. *Id.* at 329. Here, as well, Congress's use of the term "shall" does not mean that courts must vacate every agency order that they remand for further consideration. As in *Hecht*, Congress used the term "shall" in a "less mandatory" sense to describe the scope of the courts' authority in reviewing agency actions. See United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (observing that "[c]ourts having jurisdiction have always exercised the power *in appropriate cases* to set aside agency action" that has been determined to be unlawful) (emphasis added).[1]

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[1] Contrary to petitioner's assertions, *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), casts no doubt on the courts' equitable discretion to decline to vacate orders that are found deficient under the APA. See Pet. 9, 10, 15; see also Br. of Resps. Focal Corporation, et al. 9. In *Bowen*, this Court held that an agency cannot promulgate retroactive rules "unless that power is conveyed by Congress in express terms." 488 U.S. at 208. Nothing in *Bowen* speaks to whether a court possesses the equitable discretion not to vacate an agency's order when the rationale supporting the order is found to be inadequate. Nor does *Bowen* or any other decision of this Court suggest that a court, in

That understanding of Section 706(2) is buttressed by common sense. If the APA required vacatur of every agency action that failed to meet Section 706 standards, even the most vital agency actions would have to be nullified, without regard to the disruptive consequences of doing so, for minor technical errors or easily correctable gaps in the agency's reasoning. See, *e.g.*, *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (remanding agency rule involving support program for sugar producers for lack of notice and comment, but declining to vacate rule when crops had already been plowed under pursuant to the program and vacatur would be "an invitation to chaos"); *Davis County Solid Waste Mgmt.* v. *United States EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (on rehearing, deciding to vacate only in part to avoid "significantly greater pollution emissions" than full vacatur would require); *Idaho Farm Bureau Fed'n* v. *Babbitt*, 58 F.3d 1392, 1405-1406 (9th Cir. 1995) (declining to vacate when doing so would risk extinction of endangered species and waste of a "significant expenditure of public resources"). By evaluating the "seriousness of the order's deficiencies" and "the disruptive consequences of an interim change that may itself be changed" (Pet. App. 9a), the court of appeals adopted a reasonable approach to vacatur that is consistent with the judiciary's traditional authority to tailor equitable remedies.

b. Petitioner asserts (Pet. 18) that Section 706(2) requires a court to vacate action that exceeds an

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exercising such discretion, cannot consider the consequences for the regulatory regime of an agency's inability to apply any new rule retroactively. Cf. *Romero-Barcelo*, 456 U.S. at 312 (instructing that courts should "pay particular regard for the public consequences" of a grant of equitable relief).

agency's "statutory jurisdiction," but permits a court to remand without vacatur when the agency's error is "insubstantial" or "clearly curable." There is no textual support for such a distinction. Nor does petitioner contend otherwise. Instead, petitioner relies on the assumption that, although an agency's reasonable interpretation of an ambiguous statute is ordinarily entitled to deference, an agency's reasonable interpretation of its own statutory authority is not. See Pet. 11.[2]

Here, even if one accepts that Section 706(2) draws the distinction identified by petitioner, the court of appeals properly exercised its equitable discretion. Although petitioner asserts (Pet. i) that the court "held [the interim compensation mechanism] to have been promulgated without statutory authority," the court held no such thing. In its first decision on reciprocal compensation, the court held that the FCC had not adequately explained why dial-up Internet traffic should not be treated as "local" traffic for purposes of Section 251(b)(5). In its second decision, the court held that Section 251(g) does not exclude that traffic from Section 251(b)(5). Those decisions speak only to the FCC's reasoning. They do not, as petitioner contends (Pet. 9), decide the agency's "statutory authority" to "regulate intercarrier compensation for ISP-bound

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[2] This Court has not resolved whether an agency's interpretation of its statutory authority should be accorded judicial deference. See *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 765-766 (1999); see also *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381-382 (1988) (Scalia, J., concurring) (explaining why such deference is warranted). No such question was presented in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), a decision on which petitioner purports to rely. See Pet. 8-9, 10-11, 15. Nor is there any basis for petitioner's characterization of this case as *Mead*'s "doctrinal companion." Pet. 8.

calls." To the contrary, the court made explicit that it was *not* "decid[ing] whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5)." Pet. App. 8a.

Indeed, in deciding not to vacate the *ISP Remand Order*, the court noted the "non-trivial likelihood" that the FCC had authority to adopt such a compensation regime for dial-up Internet traffic. Pet. App. 8a. The court's view is well-founded. The FCC's statutory authority to regulate interstate communications is undisputed. See, *e.g.*, *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). The FCC's rulemaking authority, moreover, "extend[s] to implementation of the local competition provisions" of the 1996 Act. *Iowa Utils. Bd.*, 525 U.S. at 378. Among those provisions are Section 251(b)(5), the reciprocal compensation provision, and Section 252(d)(2), which generally sets pricing standards for traffic subject to reciprocal compensation and specifically authorizes "bill-and-keep" as a compensation mechanism for such traffic. Accordingly, because the court did not hold that the FCC lacked authority to regulate compensation for dial-up Internet traffic, petitioner's argument rests on an incorrect premise.

2. Contrary to petitioner's suggestion (Pet. 16, 19-21), the decision in this case does not conflict with the decision of any other circuit. To date, three circuits have expressly adopted the D.C. Circuit's *Allied-Signal* test for determining whether agency action that fails to meet Section 706 standards should be vacated. See *Central Maine Power Co.* v. *FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Central & S.W. Servs., Inc.* v. *United States EPA*, 220 F.3d 683, 692 (5th Cir. 2000), cert. denied, 532 U.S. 1065 (2001); *National Org. of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365,

1380 (Fed. Cir. 2001). Petitioner cites no appellate decision holding that the APA eliminates the courts' authority to remand an agency's decision without vacating it.

Petitioner erroneously asserts (Pet. 19) that the Ninth Circuit's decision in *Idaho Farm Bureau*, 58 F.3d at 1405-1406, conflicts with the D.C. Circuit's decision in this case. In *Idaho Farm Bureau*, the Ninth Circuit expressly held that "when equity demands," a regulation that does not meet Section 706(2) standards "can be left in place while the agency follows the necessary procedures." *Id.* at 1405. As support, the Ninth Circuit cited *Fertilizer Institute* v. *United States EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)—a decision that the D.C. Circuit has since cited as consonant with its *Allied-Signal* approach. See *Sugar Cane Growers*, 289 F.3d at 98.

Nor does the D.C. Circuit's decision in this case conflict with the Eighth Circuit's decision in *United States ex rel. O'Keefe* v. *McDonnell Douglas Corp.*, 132 F.3d 1252 (1998), which petitioner erroneously describes as vacating agency action that was found to have been undertaken without statutory authority. See Pet. 11, 16, 19. *O'Keefe* was a *qui tam* suit under the False Claims Act, not a suit to review agency action under the APA. In that case, the court of appeals held that Justice Department attorneys were subject to local ethics rules, rejecting the contention that the Justice Department had the statutory authority to issue "substantive regulations" governing the conduct of its attorneys that would supersede local rules. *Id.* at 1254-1257. The court had no occasion in *O'Keefe* to consider whether to vacate the regulations or to remand to the

agency without vacatur. The court simply declined to apply the regulations to the case at hand.[3]

3. Petitioner asserts that the court of appeals' decision, if not reviewed by this Court, will encourage agencies "lawlessly [to] promulgate rules that exceed their authority, confident that under the 'non-trivial likelihood' standard, appellate review will, at worst, only result in a remand." Pet. 25-26. That assertion is wholly without merit. As an initial matter, since the court of appeals did *not* hold that the rules at issue in this case "exceed [the FCC's] authority" (see pp. 12-13, *supra*), its decision provides no indication of how the court would deal with rules that were held to exceed an agency's statutory authority. Cf. *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 15 (D.C. Cir. 2002) (vacating agency action after finding that the agency "has attempted to exert authority where it has none"). More generally, courts do not presume that government agencies will deliberately disregard the requirements and constraints of their governing statutes. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 227-228 (2001) (agencies are entrusted to administer regulatory statutes) (citing *Chevron U.S.A. Inc.* v. *Natural Re-*

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[3] Petitioner suggests (Pet. 16-17, 21-22) that this Court's review is necessary to resolve inconsistencies in the D.C. Circuit's own decisions concerning whether to vacate agency orders found deficient under the APA. This Court does not sit to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, as the denial without dissent of petitioner's request for rehearing en banc suggests, the law in the D.C. Circuit is settled, notwithstanding that some of its judges have disagreed with that law. See *Milk Train, Inc.* v. *Veneman*, 310 F.3d 747, 756-758 (D.C. Cir. 2002) (Sentelle, J., dissenting); *Checkosky* v. *SEC*, 23 F.3d 452, 490-493 (D.C. Cir. 1994) (Randolph, J., dissenting in part).

sources Defense Council, Inc., 467 U.S. 837, 844 (1984)). Nor does petitioner offer any reason to believe that agencies would be indifferent to the possibility of remand when promulgating their rules. See, *e.g.*, *ICORE, Inc.* v. *FCC*, 985 F.2d 1075, 1077-1078 (D.C. Cir. 1993) (after remand without vacatur of initial decision, FCC responded with subsequent decision that was upheld on review). And, as petitioner itself points out, the D.C. Circuit has not hesitated to vacate agency action when it considers vacatur to be the appropriate remedy. See Pet. 16-17, 22 (citing cases). An agency could thus have no "confiden[ce]" of avoiding vacatur of a rule held not to satisfy Section 706(2) standards.

Similarly unsound is petitioner's assertion that the court of appeals' approach "delegates unfettered discretion to individual appellate panels to decide whether to remand or to vacate unlawful agency rules without any judicially manageable standards." Pet. 22. The "essence of equity jurisdiction" is "[f]lexibility rather than rigidity." *Hecht*, 321 U.S. at 329. The *Allied-Signal* approach is, if anything, more circumscribed than the traditional equitable approach of balancing the interests of the parties and the impact on the public in order to "do equity." *Romero-Barcelo*, 456 U.S. at 312.

Petitioner did not, to be sure, receive all of the relief that it would have liked. But there is never any assurance that a litigant that successfully invokes the courts' equitable authority will receive all of the relief it seeks. See, *e.g.*, *Romero-Barcelo*, 456 U.S. at 312-313, 320; *Hecht*, 321 U.S. at 327-328. That does not mean that the FCC "won in the court of appeals." Pet. 25. It was petitioner that won. The FCC now must reconsider its policies in light of the court of appeals' decision. If the FCC fails to do so, or "unreasonably delay[s]" that task, 5 U.S.C. 706(1), the D.C. Circuit is

fully capable of ensuring that its decision is not ignored. See, *e.g.*, *Radio-Television News Directors Ass'n* v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000); see also *Romero-Barcelo*, 456 U.S. at 320 ("Should it become clear that * * * compliance with the [statute] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-980

IN THE

Supreme Court of the United States

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CORE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the D.C. Circuit's decision to remand, but not vacate, the FCC's transitional intercarrier compensation rules is consistent with settled principles of administrative law, where the court found it likely that the FCC has authority to issue those rules under statutory provisions different from the one on which the FCC had relied, and where vacatur of the rules pending completion of the remand proceedings would reinstate a regime that the FCC found fostered regulatory arbitrage and distorted the development of competitive markets.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, SBC Communications Inc., the Verizon telephone companies,* and the United States Telecom Association state the following:

BellSouth Corporation has no parent company, and no publicly owned company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The United States Telecom Association ("USTA") is the leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA represents some 600 facilities-based incumbent wireline providers of local telephone service, which operate more than 80% of the country's local access lines. USTA also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

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* The Verizon telephone companies (formerly the affiliated local telephone companies of Bell Atlantic Corporation and GTE Corporation) consist of the following: Contel of the South, Inc. d/b/a Verizon Mid-States; GTE Midwest Incorporated d/b/a Verizon Midwest; GTE Southwest Incorporated d/b/a Verizon Southwest; The Micronesian Telecommunications Corporation; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.

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PRELIMINARY STATEMENT

In accordance with its established, widely accepted precedents, the D.C. Circuit concluded that it should remand, but not vacate, an order of the Federal Communications Commission ("FCC") adopting new transitional rules to govern the compensation that one local exchange carrier ("LEC") must pay to another when they exchange calls bound for the Internet. Petitioner's challenge to the court's exercise of its remedial discretion rests on a false premise. According to petitioner, the D.C. Circuit's decision to remand without vacating permitted the FCC "to enforce rules that it had no statutory authority to promulgate." Pet. 8. This is so, petitioner asserts, because the D.C. Circuit held that "the FCC had no power to regulate intercarrier compensation for [Internet]-bound calls." Pet. 9. The entire petition proceeds on that starting assumption.

But in fact the D.C. Circuit held no such thing. Although it concluded that the specific statutory provision on which the FCC had relied did not support the rules at issue, the court believed it likely that the FCC could justify the rules under other statutory provisions. For that reason — and in view of the FCC's amply supported conclusion (which petitioner here makes no attempt to dispute) that the rules at issue were necessary first steps in eliminating regulatory arbitrage that had been undermining the development of competition in local telephone markets — the court determined to allow those rules to remain in place while the FCC conducts its proceedings on remand.

The court's decision is correct, and petitioner's claims of circuit and intra-circuit conflicts are meritless. The petition for a writ of certiorari should therefore be denied.

STATEMENT OF THE CASE

1. The 1996 Act. The provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act"), at issue here were designed to open the local telephone business to real and sustainable competition. To that end, Congress preempted all state laws establishing local

telephone franchises, *see* 47 U.S.C. § 253(a), and also established rules to ensure that a competitive local exchange carrier ("CLEC"), such as petitioner Core Communications, Inc. ("CoreTel"), can "interconnect" its network with that of an incumbent local exchange carrier ("ILEC"), such as respondents BellSouth, SBC, and Verizon, *see id.* § 251(c)(2). Interconnection enables callers who subscribe to a CLEC's telephone service to receive calls from, and place calls to, individuals who subscribe to the ILEC's service.

The 1996 Act requires interconnecting local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5).[1] The Act specifies that such arrangements may "provide for the mutual and reciprocal recovery" of costs through intercarrier payments or through "arrangements that waive mutual recovery (such as bill-and-keep arrangements)." *Id.* § 252(d)(2).[2] The FCC's initial regulations implementing § 251(b)(5) required carriers to provide compensation only for the "transport and termination of local telecommunications traffic," defined as traffic that "originates and terminates within a local service area established by the state commission." 47 C.F.R. §§ 51.701(b)(1), 51.703(a) (1996). The FCC explained that § 251(b)(5) is "intended for a situation in which two carriers collaborate to complete a local call" and "do[es] not apply to the transport or termination of interstate or intrastate interexchange traffic"; instead, compensation for "interstate access services" will continue to be governed by pre-1996 Act rules pursuant

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[1] Reciprocal compensation typically works as follows: When a customer of Carrier A calls a customer of Carrier B in the same local area, Carrier A pays Carrier B for "terminating" (or completing) that local call. Similarly, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A. Reciprocal compensation is generally computed on a minutes-of-use basis.

[2] In a "bill-and-keep" arrangement, each carrier is responsible for its own costs, recovering them from its own customers rather than from the other carrier.

to 47 U.S.C. § 251(g). *Local Competition Order*,[3] 11 FCC Rcd at 16013, ¶ 1034 (citing 47 U.S.C. § 251(g)).

2. The 1999 *ISP Declaratory Ruling*. Shortly after the FCC promulgated its initial regulations, disputes arose between ILECs and CLECs as to whether Internet-bound traffic is local traffic subject to reciprocal compensation under § 251(b)(5).[4] The issue is significant because, unlike other types of calls where the traffic exchanged flows in both directions (and where compensation for such traffic is therefore "reciprocal"), dial-up calls to the Internet are made in only one direction, from the customer initiating the call to the Internet. If these one-way calls were subject to the obligation to pay reciprocal compensation, it would allow carriers to engage in what the FCC has termed "regulatory arbitrage," by inserting themselves between the carrier that serves the customer making the call and an Internet Service Provider ("ISP"). In that scenario, calls are originated by an ILEC customer, handed off to a CLEC, and from there routed to an ISP, such as America Online, for termination to destinations on the Internet that are located across the country and around the world. Because these calls flow in one direction only, the CLEC could skim off a steady stream of payments for doing nothing other than serving as a passive conduit through which Internet-bound calls travel.

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[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

[4] The terms "Internet-bound" and "ISP-bound" are essentially interchangeable; both refer to communications that originate on a carrier's network and are delivered to an ISP for onward transmission to distant locations over the Internet.

CLECs contended that they should be able to do precisely that, on the theory that such traffic should be treated as two separate calls: one, a local call from an ILEC customer to an ISP for which reciprocal compensation is required; the other, the continuing connection provided by the ISP to distant locations on the Internet. ILECs, on the other hand, argued that Internet-bound traffic involves a continuous, non-local communication between the ILEC customer and the customer's chosen destinations on the Internet, an analysis that is consistent with the FCC's long-standing recognition that service providers such as ISPs "obtain[] local exchange services . . . for the purpose of completing interstate calls which transit its location" en route to a destination "out of state."[5] Although Internet-bound traffic would thus not be subject to reciprocal compensation, carriers that serve ISPs could recover directly from their ISP customers any costs they incur in carrying that traffic.

In 1999, the FCC issued the *ISP Declaratory Ruling*,[6] in which it agreed with the ILECs that Internet-bound traffic "do[es] not terminate at the ISP's local server, . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." 14 FCC Rcd at 3697, ¶ 12. The FCC reached this conclusion based on its "traditional[]" jurisdictional analysis, under which it assesses the "nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." *Id.* at 3695, ¶ 10. The FCC further found that, on an "end-to-end"

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[5] Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711-12, ¶ 78 (1983).

[6] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*"), *vacated, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

basis, "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Id.* at 3702, ¶ 18. Accordingly, the FCC concluded that Internet-bound traffic is "non-local interstate traffic" and that "the reciprocal compensation requirements of section 251(b)(5) . . . and . . . of the Commission's rules do not govern inter-carrier compensation for this traffic." *Id.* at 3706, ¶ 26 n.87.

3. The D.C. Circuit's *Bell Atlantic* Decision. CLECs filed petitions for review of the *ISP Declaratory Ruling*, challenging the FCC's conclusion that Internet-bound traffic is non-local, interstate traffic that is not subject to reciprocal compensation under § 251(b)(5). On appeal, the D.C. Circuit held that the FCC "ha[d] not provided a satisfactory explanation" for its conclusion that its traditional jurisdictional analysis determines whether Internet-bound traffic is local traffic subject to § 251(b)(5). *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). It therefore vacated and remanded the *ISP Declaratory Ruling*. The D.C. Circuit did not take issue with the FCC's end-to-end analysis of Internet-bound traffic, finding that there is "no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate." *Id.* at 5. Instead, the court found that the FCC had not sufficiently explained why that end-to-end analysis should also control whether Internet-bound traffic is local for purposes of the § 251(b)(5) reciprocal-compensation obligation. *See id.* at 3, 6, 9. Contrary to CoreTel's claim (Pet. 4-5), the D.C. Circuit did not hold that the FCC "lacked statutory authority" for its ruling; in fact, the court made clear that, with proper explanation, the FCC could again determine that neither the 1996 Act nor its regulations impose reciprocal-compensation obligations for Internet-bound traffic. *Bell Atlantic*, 206 F.3d at 9; *see also* Transcript of Oral Argument at 10, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. argued Feb. 12, 2002) ("Oral Arg. Tr.") (describing the *Bell Atlantic* court as "rigorously agnostic" on the question whether § 251(b)(5) requires payment of reciprocal compensation for Internet-bound traffic).

4. The FCC Proceedings on Remand. On remand from the D.C. Circuit's decision, the FCC reiterated, albeit on a different statutory theory, that an Internet-bound call is not subject to reciprocal compensation under § 251(b)(5). The FCC reasoned that Congress, in § 251(g), "carve[d] out" of § 251(b)(5) certain classes of telecommunications service — "'exchange access, information access, and exchange services for such access.'" *ISP Remand Order*[7] ¶ 34 (quoting 47 U.S.C. § 251(g)). The FCC noted that it had relied on § 251(g) in the *Local Competition Order* in holding that § 251(b)(5) does not apply to interstate access traffic, such as long-distance calls. *See id.* ¶ 36 & n.64 (citing *Local Competition Order*, 11 FCC Rcd at 16103, ¶ 1034).

The FCC further held that Internet-bound traffic is a form of "access" traffic — specifically, "information access" — that is subject to the "carve out" in § 251(g). *See id.* ¶ 44. That is so, the FCC explained, because Internet-bound traffic, like other types of access traffic, "travel[s] to points — both interstate and intrastate — beyond the local exchange." *Id.* ¶¶ 1, 37. Consequently, compensation for such traffic is governed not by § 251(b)(5) but rather by § 201, which authorizes the FCC to regulate compensation for interstate traffic. *See id.* ¶¶ 42, 44, 52.

Moreover, the FCC once again rejected CLECs' claims that Internet-bound traffic consists of two calls, one of which is a local call. *See id.* ¶ 44 & n.82. Instead, "when viewed on an end-to-end basis," Internet-bound calls "permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified." *Id.* ¶¶ 58-59; *see id.* ¶ 59 ("[t]he 'communication' taking place is between the dial-up customer and the global computer network of web content," not "with ISP modems").

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[7] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Therefore, an Internet-bound call is not, as CLECs had claimed, "simply a local call from a consumer to a machine," nor is it "really like a call to a local business — such as a pizza delivery firm . . . — that then uses the telephone to order wares to meet the [caller's] need." *Id.* ¶¶ 63, 64 (internal quotation marks omitted).

Finally, the FCC found, based on an extensive record, that state commission decisions requiring payment of reciprocal compensation for Internet-bound traffic had "distort[ed] the development of competitive markets" and had led to "classic regulatory arbitrage." *Id.* ¶¶ 21, 29. Because, as noted above, Internet-bound traffic is inherently one-way, decisions requiring the payment of reciprocal compensation had given CLECs an overwhelming economic incentive to sign up ISPs as customers, and a corresponding economic *dis*incentive to provide competing local telephone service to end-users. Whereas each ISP customer was an asset (because it allowed the CLEC to reap enormous revenue flows from originating carriers), each end-user customer was a liability (because the customer's Internet-bound calls would expose the CLEC to enormous revenue outflows). As the FCC noted, "convincing evidence in the record" showed that carriers have "targeted ISPs as customers merely to take advantage of these intercarrier payments" — offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud. *Id.* ¶¶ 2, 70 & n.134, 86. The problem was pervasive: CLECs were receiving, on average, 18 times more traffic than they were originating, "resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic." *Id.* ¶ 5. The Commission concluded that this regime, which affirmatively discouraged CLECs from providing local voice service, was contrary to public policy and fundamentally incompatible with the pro-competitive goals of the 1996 Act. *See id.* ¶¶ 21, 70-71, 87 n.171.[8]

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[8] CoreTel never disputes — or even discusses — the FCC's findings in this regard. Indeed, in reproducing excerpts of the *ISP Remand Order* in

The Commission determined that "a bill and keep approach" — under which carriers "recover the costs of delivering traffic to ISP customers directly from those customers" — "is likely to be more economically efficient than recovering these costs from originating carriers," because it "is likely to send appropriate market signals and substantially eliminate existing opportunities for regulatory arbitrage." *Id.* ¶ 67. The Commission accordingly adopted a Notice of Proposed Rulemaking, in which it proposed to replace existing state-created schemes of reciprocal compensation with a "bill-and-keep" system.[9]

At the same time, though, the Commission recognized that "the record indicates a need for immediate action with respect to ISP-bound traffic." *Id.* ¶ 7. In response to CLECs' pleas that the Commission not immediately end the payment of reciprocal compensation for Internet-bound traffic, the FCC adopted, under § 201, a three-year interim compensation regime for such traffic, "to avoid a 'flash cut' to a new compensation regime." *Id.* ¶ 77. The FCC's "primary goal," however, remained "limit[ing], if not end[ing], the opportunity for regulatory arbitrage" created by the prevailing, state-commission established, reciprocal-compensation requirements. *Id.* Even most of the beneficiaries under the prior system (including petitioner's own trade association) praised the FCC for having struck a reasonable interim balance in this transitional regime.[10]

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the appendix to its petition, CoreTel conspicuously omits nearly all the FCC's findings on this issue.

[9] *See* Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) ("*Unified Intercarrier Compensation NPRM*").

[10] *See, e.g.*, CompTel Press Release, *CompTel Views FCC Reciprocal Compensation Decision as a Victory for Competition and Consumers* (Apr. 19, 2001) ("[t]he new reciprocal compensation rules announced today by the FCC achieve a reasonable compromise"), *at* http://www.comptel.org/press/apr19_2001.html; Statement of John Windhausen, Jr.,

5. The Court of Appeals Proceedings. On review, the D.C. Circuit rejected the FCC's theory that § 251(g) excludes Internet-bound traffic from the § 251(b)(5) reciprocal-compensation obligation, finding that § 251(g) "is not susceptible to the Commission's reading." Pet. App. 5a. For that reason alone, the court "remand[ed] the case to the Commission for further proceedings." *Id.* at 9a.

Having thus found that "§ 251(g) does not provide a basis for the Commission's action," the D.C. Circuit "ma[d]e no further determinations." *Id.* at 8a. Among the issues that the court expressly stated it was not resolving were "whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5)" and whether "the interim pricing limits imposed by the Commission are inadequately reasoned." *Id.* The court also made clear that it was *not* holding that the FCC was wholly without statutory authority to adopt its rules. On the contrary, the court explained that "[m]any of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)[(2)](B)(i))." *Id.* at 8a-9a.

It was in this context that the court applied the test it had set forth most prominently in *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), to determine whether to vacate the FCC's rules or merely to remand. Under that long-established standard, the "decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51 (internal quotation marks omitted). Given its own conclusion that the FCC may well have authority to adopt its rules under other provisions, and the disruptive consequences of reinstating the anti-competitive arbitrage schemes that prevailed

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ALTS (Apr. 19, 2001), *at* http://www.alts.org/NewsPress/041901RecipComp.PDF.

prior to the FCC's action, the court expressly decided "not [to] vacate the order." Pet. App. 8a-9a.

CoreTel filed a petition for rehearing and rehearing *en banc*, as did two other CLECs and the state commissions. Each of the petitions challenged, on similar though not identical grounds, the D.C. Circuit's decision not to vacate the *ISP Remand Order*. The court requested a response from the FCC with respect to only one of the petitions (not CoreTel's); the ILEC Respondents also sought leave to file a response, which the court granted. Upon consideration of those responses, the court denied that petition. *See* Order, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. Sept. 25, 2002).[11] In separate orders, issued on September 24, 2002, the court denied the petitions for which it had not requested responses. *E.g.*, Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF THE COURT OF APPEALS' DECISION

CoreTel repeatedly claims that its petition presents the question whether the court of appeals, having held "that the FCC had no power to regulate intercarrier compensation for ISP-bound calls," "was obligated to vacate the *ISP Remand Order*." Pet. 9; *see, e.g.*, Pet. 8, 11, 12, 13-14, 15, 16, 17, 18. But the judgment below does not raise that question, because the D.C. Circuit did not hold what CoreTel claims it held.

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[11] The two other CLECs that jointly sought rehearing of the decision below, Focal Communications Corp. and Pac-West Telecomm, Inc., along with two additional CLECs (collectively, "CLEC respondents"), have filed a response in support of CoreTel's petition. As explained below, they also raise no certworthy issue. In any event, this Court need not consider their claims at all: they are not presented in the petition (indeed, they often contradict the claims in the petition), and they were not presented to the D.C. Circuit in the Focal/Pac-West petition for rehearing *en banc*, where those CLECs argued (as CoreTel does here) that the decision below reflected an improper application of *Allied-Signal*.

The court of appeals held only that the particular statutory provision on which the FCC relied — § 251(g) — did not provide a substantive basis for the regulations promulgated; the court did not suggest, let alone hold, that the Commission has no jurisdiction or authority to regulate intercarrier compensation for interstate access traffic, such as Internet-bound traffic. *See* Pet. App. 8a.

On the contrary, the court explicitly recognized that other statutory provisions are likely to provide the necessary substantive basis for the transitional rules adopted in the *ISP Remand Order*. *See id.* at 8a-9a (citing as examples 47 U.S.C. §§ 251(b)(5), 252(d)(2)(B)(i)).[12] Under long-settled principles of administrative law, however, the court of appeals could not rely on those statutory provisions, or any other provisions on which the Commission had not relied, to affirm the FCC's rules. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).[13] Instead, it is for the Commission to evaluate those alternatives in the first instance on remand; once it does so, its interpretation will, of course, be entitled to *Chevron* deference. *See National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior*, 526 U.S. 86, 100 (1999); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 368 n.14 (1994).

Moreover, the fact is that it is the D.C. Circuit's practice to vacate a regulation when it concludes that the regulation is entirely outside the agency's statutory authority. Indeed, the court did just that shortly after it decided the present case, in a decision that CoreTel neglects to mention. *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 15 (D.C. Cir. 2002) (vacating because agency "has attempted to exert authority

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[12] Even the CLEC respondents recognize that the court below did no more than "reject[] the statutory basis for the *ISP Remand Order*" and that it also found that "some other statutory authority" could support the rules at issue. CLEC Resp. 3.

[13] The existence of such provisions, however, is relevant "with respect to the choice between vacatur and remand." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 541 (D.C. Cir. 2002).

where it has none" and could "point to no statute authorizing its" rule). At most, therefore, CoreTel's petition amounts to a request for this Court to perform an error-correcting function by determining whether the D.C. Circuit erred when it concluded that this principle does not apply here. Cases asking this Court to correct the application of established legal principles ordinarily do not warrant plenary review.

Nor is there any merit to CoreTel's underlying substantive contention that the FCC acted "beyond the scope of power delegated to it" in issuing the *ISP Remand Order* and that it was not "entrusted to administer" the Act's reciprocal-compensation provisions. Pet. 15 (internal quotation marks omitted). As this Court has recognized, the FCC has the authority to determine the scope of the obligations created by the 1996 Act, and, to the extent those obligations apply, the "FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999); *see id.* at 380 ("§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). And, of course, it has long been settled that § 201(b) authorizes the FCC to regulate interstate access traffic, which the FCC has repeatedly found includes Internet-bound traffic. *See, e.g., Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945); *see also ISP Remand Order* ¶ 55.[14]

For these reasons, this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Bowen v. Georgetown*

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[14] Before the D.C. Circuit, the CLEC Petitioners, including CoreTel and the CLEC respondents here, acknowledged that the FCC has statutory authority to issue regulations governing compensation for Internet-bound traffic. *See* Reply Brief of Carrier Petitioners and Supporting Intervenors at 19, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. filed Nov. 15, 2001). Here, the CLEC respondents claim that the FCC's authority is "not relevant to the issue presented in the CoreTel Petition," CLEC Resp. 3 n.1, but that view simply cannot be squared with the petition itself, which rests on the false premise that the D.C. Circuit held that the FCC lacks statutory authority to regulate intercarrier compensation for Internet-bound traffic.

University Hospital, 488 U.S. 204 (1988), on both of which CoreTel relies, have no bearing here. This case is not a "companion" to *Mead*, nor does it raise any question left open there. Pet. 8-9. As this Court and the court below have held, Congress unambiguously delegated rulemaking authority to the FCC with respect to the regulatory treatment of Internet-bound traffic; the agency's decision to address this question through a notice-and-comment proceeding raises no questions under *Mead*. *See* 533 U.S. at 229-31.[15] For the same reason, *Bowen*'s admonition that an agency's "power to promulgate legislative regulations is limited to the authority delegated by Congress" is not implicated here. 488 U.S. at 208; *see* 47 U.S.C. § 201(b).[16]

II. THE COURT OF APPEALS' APPLICATION OF ITS SETTLED PRECEDENT IS CORRECT AND DOES NOT MERIT REVIEW

Stripped of its primary misconception, CoreTel's petition presents only the question whether the D.C. Circuit properly applied its established test for determining whether to vacate an agency's rule. Petitioner's attack on the merits of that decision, which would require the Court to consider case-specific application of basic principles of administrative law,

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[15] CoreTel's lengthy argument that administrative agencies should not be accorded deference when they "act[] beyond the scope of power delegated . . . by Congress" is therefore entirely beside the point. Pet. 12-15.

[16] Nor are the CLEC respondents correct in characterizing *Allied-Signal* as an "overt effort to evade the implications of [*Bowen*]." CLEC Resp. 9. *Bowen* involved an agency's attempt to resurrect, and give retroactive effect to, a rule that a district court had vacated; it did not speak either to whether the district court chose the correct remedy (the agency did not appeal the district court's decision) or to what actions the agency could have taken if the district court had chosen to remand, but not vacate, the rule. Thus, as the D.C. Circuit has recognized, *Bowen* does not "yield an inference in favor of courts exercising their remedial discretion in favor of creating gaps [through vacatur] that as a result will be impossible to fill." *ICORE, Inc. v. FCC*, 985 F.2d 1075, 1082 (D.C. Cir. 1993) (emphasis omitted).

presents no certworthy issue. In any event, contrary to CoreTel's claims, the decision below did not establish a new test for vacatur, but instead was a run-of-the-mine application of that court's precedent.

1. Under settled precedent in the D.C. Circuit, an "inadequately supported rule . . . need not necessarily be vacated"; the "decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150-51 (quoting *International Union, United Mine Workers v. Federal Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).[17]

CoreTel does not challenge any of this; indeed, it agrees that a court need not vacate a rule that it concludes must be remanded to the agency for further proceedings. *See* Pet. 14.[18] Instead, CoreTel argues that the decision below

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[17] The CLEC respondents, citing a footnote in a 1995 decision, suggest that *Allied-Signal* "is not even settled [law] within the D.C. Circuit." CLEC Resp. 5. More recent decisions make clear that even those few D.C. Circuit judges who disagree with *Allied-Signal* recognize that the court's decisions "provide precedent for the authority of the court to remand without vacating." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting).

[18] The CLEC respondents, directly contradicting CoreTel and the position taken by two of their number before the D.C. Circuit, argue that *Allied-Signal* is contrary to the Administrative Procedure Act ("APA") and that a court may never remand without also vacating. CLEC Resp. 3-4, 5-7. But nothing in the APA provides the "unequivocal statement of [legislative] purpose" that this Court has held is necessary to find that Congress has curtailed the federal courts' traditional remedial discretion. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). In any event, even Judge Randolph, the primary expositor of the position that the CLEC respondents advance here, agrees that a court, despite having vacated an agency action, may stay its mandate (thus preserving the effectiveness of the challenged rule) until proceedings on remand are complete. *Checkosky v. SEC*, 23 F.3d 452, 493 n.37 (D.C. Cir. 1994) (opinion of Randolph, J.) (describing "appl[ication] for a stay of the mandate" as "the usual and appropriate method" of addressing agency's claim "that vacating its order

expands on the rule in *Allied-Signal* and, "for the first time," does not vacate a "rule[] for which the agency had not supplied statutory support." Pet. 15-19. But CoreTel has simply overlooked or misread the D.C. Circuit's precedents. On numerous occasions, that court has declined to vacate agency orders in cases where, as here, the court found insufficient the particular source of statutory authority identified in the agency's order, while leaving open the question whether other statutory provisions could provide the requisite authority. For example, in *Davis County Solid Waste Management v. EPA*, the D.C. Circuit on rehearing refused to vacate part of a set of rules, despite initially concluding that "they exceed the EPA's statutory authority," after finding that this part of the rules likely could be reinstated on remand consistent with the governing statute and that the consequences of vacating that part would be particularly disruptive. 101 F.3d 1395, 1411 (D.C. Cir. 1996), *modified on reh'g*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam).[19]

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or rule would cause difficulties"). Like CoreTel, the CLEC respondents neither mention nor challenge the validity of this widely accepted practice. *See infra* pp. 18-19.

[19] Nor is *Davis County* the only such case where the D.C. Circuit has remanded but not vacated based on its conclusion that statutory provisions other than the one on which the agency relied could support the agency's rule. *See American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 14-15 (D.C. Cir. 2002) (per curiam) (declining to vacate rule despite finding that it "appear[ed] to extend [an] express statutory deadline," "which is beyond the agency's authority"); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047-48 (D.C. Cir.) (declining to vacate rule despite finding that agency, among other things, "failed to comply with § 202(h)," which sets limits on the agency's authority to retain certain rules), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *USTA v. FBI*, 276 F.3d 620, 626-27 (D.C. Cir. 2002) (declining to vacate rule despite rejecting agency's interpretation of its statutory authority, because "it is not so clear . . . that there are no defensible grounds for its conclusions"); *National Mining Ass'n v. EPA*, No. 95-1006, 1996 WL 10101 (D.C. Cir. Jan. 16, 1996) (following decision rejecting agency's interpretation of its authority under § 112 of the Clean Air Act, court denied motion to enforce mandate and compel agency to vacate rule, because "opinion and judgment did not vacate EPA's rule"); *International Union,*

2. Equally mistaken is CoreTel's claim that the D.C. Circuit, by resting its decision not to vacate the *ISP Remand Order*, in part, on the ground that "there is plainly a non-trivial likelihood that the Commission has authority" to adopt the regulations at issue under other provisions of the Communications Act (Pet. App. 8a-9a), "create[d] for the first time a new standard of review of agency jurisdiction." Pet. 18. There is nothing novel about the court's decision. The D.C. Circuit has recognized that the factors it considers in deciding whether to vacate an agency action "interrelate on a sliding scale and must be balanced against each other." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998); *see also International Union*, 920 F.2d at 966-67 (analogizing *Allied-Signal* factors to those considered in deciding whether to grant preliminary injunction). In *Allied-Signal* itself, the D.C. Circuit "refrain[ed] from vacating [a] rule" despite "giv[ing] little weight to the possibility that the Commission could pull a reasonable explanation out of the hat." 988 F.2d at 152-53. Instead, in exercising its remedial discretion with respect to that rule, the court stressed the fact that vacatur "would give licensees a peculiar windfall." *Id.*

In any event, CoreTel takes too literally the court's understated reference to a "non-trivial likelihood." The court found it "plain[]" that alternative statutory provisions might support the FCC rules, Pet. App. 8a, specifically mentioning one such alternative in the opinion (47 U.S.C. §§ 251(b)(5) and 252(d)(2)(B)(i)), *see* Pet. App. 8a-9a, and another one at oral argument (47 U.S.C. §§ 201, 251(i)), *see* Oral Arg. Tr. at 37. Nor are these the only possibilities. To take another example, § 251(b)(5) on its face imposes an obligation on

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United Auto. Workers v. OSHA, 938 F.2d 1310, 1317-18, 1325-26 (D.C. Cir. 1991) (requesting briefing on whether to vacate agency's rule in view of finding that agency's claimed statutory authority "raise[d] a serious nondelegation issue"), *order on supplemental briefing*, No. 89-1559, 1991 WL 223770 (D.C. Cir. Sept. 16, 1991) (ruling that supplemental briefing had not "persuaded [the court] that it would be appropriate to vacate all or part of the rule").

"local exchange carriers" to establish "reciprocal" compensation obligations for the exchange of traffic. The Commission might conclude that it makes no sense to extend that obligation to an entire class of traffic that by its nature is one-way and therefore non-reciprocal, a conclusion that would be reinforced by the accompanying pricing standard in § 252(d)(2)(A), which provides for the "mutual and reciprocal" recovery of the costs associated with the exchange of traffic. Likewise, § 251(b)(5), and its accompanying pricing standard, expressly imposes such an obligation only on traffic that originates on the network of one carrier and terminates on the network of another. But the FCC repeatedly has held that Internet-bound traffic does not terminate on the network of a carrier serving an ISP, but continues on over the Internet to destinations around the globe. And, of course, even when it does apply, § 251(b)(5) itself contemplates the use of bill-and-keep arrangements.

In addition, there can be no doubt that the second prong of the *Allied-Signal* test — whether vacatur would have "disruptive consequences" — is satisfied here. As explained above, CoreTel nowhere challenges the Commission's conclusion, solidly based on an extensive record, that payment of reciprocal compensation for Internet-bound traffic led to "classic regulatory arbitrage," "undermine[d] the operation of competitive markets," was contrary to public policy, and was fundamentally incompatible with the pro-competitive goals of the 1996 Act. *ISP Remand Order* ¶¶ 21, 29, 70-71, 87 n.171.[20] This evidence left the FCC with no doubt of the need for "*immediate action* with respect to ISP-bound traffic" and led it to adopt the interim compensation regime that

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[20] Accordingly, CoreTel's blithe assertion that the D.C. Circuit's finding of disruptive consequences was "without record support" is at war with reality. Pet. 19 n.5. CoreTel simply ignores the FCC's conclusion that continued payment of reciprocal compensation for Internet-bound traffic would further delay the "viable, long-term competition among efficient providers of local exchange and exchange access services" that Congress sought to promote in the 1996 Act. *ISP Remand Order* ¶ 71.

CoreTel seeks to have vacated. *Id.* ¶ 7 (emphasis added). Vacatur would allow CLECs to continue to "target[] ISPs as customers" in order "to reap an intercarrier compensation windfall." *Id.* ¶¶ 2, 86. This is particularly true with respect to CoreTel. Its filings before the D.C. Circuit revealed that it targets ISP customers exclusively, leading the FCC to deem it "the poster boy of reciprocal compensation gamesmanship." Response of FCC to CoreTel Emergency Motion for Stay at 14, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. filed June 12, 2001).

3. CoreTel's accusation that the D.C. Circuit has recently "collapse[d] ... into ... *ad hoc*, results-oriented appellate review" of FCC actions is baseless. Pet. 21. Neither of the decisions that CoreTel claims evidence "a similarly careless approach" (*id.*) to the question of vacatur provides any support for its charge; instead, both demonstrate the same careful consideration of that question found in the opinion below.

In *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit held that the FCC's definition of a term in a rule that it promulgated was arbitrary and capricious — precisely the situation where CoreTel agrees that *Allied-Signal* sets forth the appropriate test for vacatur (Pet. 18-19) — but the panel divided over the appropriate remedy. *See* 284 F.3d at 169. Although the majority decided to remand the case for further consideration, Judge Sentelle dissented from that decision on the narrow ground that, in his view, § 202(h) of the 1996 Act — a provision that requires the FCC to revisit its broadcast media ownership rules and that is not applicable to the regulations at issue here — establishes a special rule requiring vacatur of any broadcast media ownership regulation that the agency cannot justify. *See id.* at 171-72 (Sentelle, J., dissenting).

In *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, No. 02-858 (U.S. Mar. 24, 2003), the D.C. Circuit, applying this Court's decision in *Iowa Utilities Board*, vacated the two orders in which the FCC established unbundled network elements under 47 U.S.C. § 252(d). The FCC adopted those two orders on remand from this Court's

vacatur of the initial order establishing such elements. *See id.* at 428, 429. There, as here, CLECs dissatisfied with the court's choice of remedy, as well as the FCC, sought rehearing. In response to those petitions, the court, in a decision that CoreTel does not mention, granted a partial stay of its mandate as to both FCC orders until January 2, 2003, to allow the FCC to issue its decision on remand. *See* Order, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002).[21] The D.C. Circuit has recognized that vacatur followed by a stay of the mandate is functionally identical to remand without vacatur. *See Maryland People's Counsel v. FERC*, 768 F.2d 450, 455 (D.C. Cir. 1985) (per curiam).

CoreTel never disputes that the court below could have followed that same procedure here, and it thus effectively concedes that the D.C. Circuit had authority to leave in place the FCC's transitional rules while the Commission conducted its proceedings on remand. Furthermore, issuing such a stay would have been consistent with that court's precedent, in light of the significant market distortions and impediments to the development of local competition that the FCC found are the result of requiring payment of reciprocal compensation for Internet-bound traffic. *See Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (mandate stayed "to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings"); *Maryland People's Counsel*, 768 F.2d at 455 (same).

Finally, the rulemaking that the FCC initiated concurrently with its release of the *ISP Remand Order* — in which the agency proposed to adopt a final rule governing intercarrier

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[21] The D.C. Circuit subsequently extended the stay of its mandate to February 20, 2003, at the request of the FCC and with the consent of all parties. *See* Order, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Dec. 23, 2002); Order, *USTA v. FCC*, Nos. 00-1015, *et al.* (D.C. Cir. Dec. 23, 2002).

compensation for Internet-bound traffic[22] — could result in the issuance of rules superseding those at issue here before this Court could decide this case on the merits. Once the FCC completes that proceeding, this case will be effectively moot, providing yet another reason why this case would be a poor vehicle for review.

III. THERE IS NO CIRCUIT CONFLICT HERE

Petitioner's claim of a circuit conflict (Pet. 19-20) is insubstantial. Indeed, in the case on which petitioner primarily relies, *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), that court, like the court below, remanded an agency action for further proceedings without vacating that action (and, moreover, reversed a district court order vacating that action). *See id.* at 1405-06. The Ninth Circuit relied there on the same factors set forth in *Allied-Signal* — namely, "the seriousness of the order's deficiencies" and "the disruptive consequences" of vacatur. 988 F.2d at 150-51 (internal quotation marks omitted); *see Idaho Farm*, 58 F.3d at 1405-06 (agency "can remedy [its] error" on remand, and vacatur has "the potential [for] extinction of an animal species").[23]

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[22] *See Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9611-13, 9633, ¶¶ 1, 3-4, 66; *see also ISP Remand Order* ¶¶ 2, 6, 83.

[23] Nor does the decision below conflict with *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998), on which petitioner also relies (Pet. 19). In that case, the court vacated a rule promulgated by the Attorney General of the United States that purported to authorize *ex parte* contacts with certain employees of a represented party, where such contacts were otherwise barred by applicable rules of the Missouri Supreme Court. *See* 132 F.3d at 1253-54. The court vacated the rule only after finding that it "cannot reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance of anything resembling" the rule at issue. *Id.* at 1257. As explained above, the D.C. Circuit in the decision below reached the opposite conclusion with respect to the rules that the FCC adopted in the *ISP Remand Order*.

At least three other circuits have also adopted the *Allied-Signal* test; neither CoreTel nor the CLEC respondents identify any circuit that has rejected it. *See National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (remanding, but not vacating, rule where "[i]t may be that the agency can provide a reasonable explanation" for its statutory interpretation on remand and vacatur would have "'disruptive consequences'"); *Central Maine Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (holding that whether to remand, but not vacate, agency action "rests in the sound discretion of the reviewing court," and remanding, but not vacating, where "a preliminary assessment suggests that the errors at issue can probably be mended" and where FERC maintained that the rule "is needed now to assure adequate energy supplies in New England"); *Central & South West Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding, but not vacating, rule where "EPA may well be able to justify its decision [on remand] . . . and it would be disruptive to vacate [the] rule"), *cert. denied*, 532 U.S. 1065 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

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NO. 02-980

IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 02-980

IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents Focal Communications Corporation, Pac-West Telecomm, Inc., RCN Telecom Services, Inc., Starpower Communications, LLC, and US LEC Corp. (collectively, "Competitive Local Telephone Companies"), each of whom were Appellant-Intervenors in the proceeding below, hereby submit their Response in Support of the Petition for Writ of Certiorari filed by Core Communications, Inc. ("CoreTel") on December 23, 2002. CoreTel petitioned for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2000). The Court should grant the writ requested by CoreTel because the *WorldCom* decision conflicts with relevant decisions of this Court. In addition, CoreTel raises an important question of federal law that has not been, but should be, settled by this Court.

Although the case at the D.C. Circuit arose under the Communications Act of 1934, as amended by the

Telecommunications Act of 1996 (the "Telecom Act"), the question presented for review is not related to the Telecom Act. Instead, the question presented is one related solely to administrative law, and more specifically, to federal court supervision of federal agencies. At bottom, this case deals with a federal court's choice of remedy on the review of a decision of a federal agency. Specifically, at issue here is the decision of the D.C. Circuit, upon reviewing a decision of the Federal Communications Commission ("FCC"), and after rejecting the statutory foundation on which the decision was based, to remand the decision to the agency without also vacating or reversing it. The Court should grant the writ of certiorari in order to review this decision and vacate the decision under review. The Competitive Local Telephone Companies submit this Response in Support to supplement the arguments asserted by CoreTel for granting the writ of certiorari.

BACKGROUND

As CoreTel explained in its Petition, in February 1999 the FCC released a *Declaratory Ruling* in which it stated that section 251(b)(5) of the Telecom Act, 47 U.S.C. § 251(b)(5), did not require the payment of "reciprocal compensation" for calls to the local telephone number of an Internet service provider ("ISP"). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*"). In March 2000, the D.C. Circuit vacated and remanded the *Declaratory Ruling* for lack of reasoned decision-making. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir 2000). On remand in April 2001, the FCC issued an Order in response to the D.C. Circuit's *Bell Atlantic* decision, and also implemented a new, interim, prospective compensation mechanism for carriers that exchanged telephone calls to ISPs. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"). Several carriers appealed the FCC decision and the new, interim compensation mechanism.

In the *ISP Remand Order*, the FCC asserted that section 251(g) of the Telecom Act, 47 U.S.C. § 251(g), provided it with the authority to exclude ISP-bound traffic from the requirements of section 251(b)(5). The FCC then established an interim, intercarrier compensation mechanism under its general regulatory authority under section 201, 47 U.S.C. § 201. In May 2002, the D.C. Circuit rejected the view that section 251(g) provided the FCC with the authority it claimed to have. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). While rejecting the statutory basis for the *ISP Remand Order*, however, the D.C. Circuit did not vacate that *Order*, or the interim intercarrier compensation mechanism, which the Competitive Local Telephone Companies also had challenged. The panel observed that the FCC may be able to find some other statutory authority that would allow it to avoid application of section 251(b)(5) to ISP-bound traffic and implement its new compensation regime, which the FCC had not yet identified (and seven months later, still has not identified.)[1] Thus, the Competitive Local Telephone Companies and CoreTel were the prevailing parties on appeal, yet they were denied an adequate remedy when the D.C. Circuit elected not to undo the harms caused by the *ISP Remand Order*.

ARGUMENT

I. The Decision to Remand Without Vacatur Conflicts With Relevant Decisions of This Court

The Court should grant a writ of certiorari in this proceeding because the D.C. Circuit's decision to remand the *ISP Remand Order* to the FCC without also vacating it conflicts with relevant decisions of this Court. Review of this case is necessary to correct the error of the D.C. Circuit.

The Court's jurisprudence regarding the Administrative Procedure Act ("APA") is clear and unequivocal. "In *all* cases

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[1] Although not relevant to the issue presented in the CoreTel Petition, it is conceivable that the FCC does have authority to implement its interim compensation regime under its general regulatory authority. What it may not do, however, is impose a new regulatory regime based on statutory authority other than section 251(b)(5) without first explaining why the existing regulatory regime under section 251(b)(5) is not applicable to ISP-bound traffic.

agency action *must* be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971) (emphasis added). The Court has not wavered from that standard. When the D.C. Circuit found that the *ISP Remand Order* was "not in accordance with law," it was obligated to vacate the *Order*.

Further, a federal court may not impose additional procedural requirements than those established in the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202 (1978). Giving the FCC a third opportunity to identify a new statutory basis to exclude ISP-bound traffic from carriers' 251(b)(5) obligations, while keeping the illegally implemented rules and regulations in place, constitutes a procedural "mulligan" not permitted under the APA.

Finally, an agency decision stands or falls on the administrative record on which the agency relied in making its decision. *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244 (1973). If that decision is not sustainable on the administrative record, it must be vacated and remanded to the agency for further consideration. *Id.* The D.C. Circuit failed to adhere to this standard when it declined to vacate the *ISP Remand Order*, effectively permitting the FCC to generate a "post-hoc rationalization" that is prohibited by *Camp v. Pitts*. Because the D.C. Circuit found that the *ISP Remand Order* was not supportable on the legal grounds asserted by the FCC, the D.C. Circuit had no choice but to vacate and remand the decision to the FCC. The Court should grant CoreTel's Petition for Certiorari to correct the D.C. Circuit's error. *See* Prestes, Brian S., "Remanding Without Vacating Agency Action," 32 Seton Hall L. Rev. 108 (2001); Levin, Ronald M., "Vacation at Sea: Judicial Remands and the APA," 21-SPG Admin. & Reg. L. News 4 (1996).

II. Whether the United States Court of Appeals for the D.C. Circuit May Remand an Agency Decision Without Vacating It Is an Important and Unsettled Question of Federal Law.

Notwithstanding the clear instructions from this Court that agency action in violation of the APA must be set aside in all cases, the D.C. Circuit has fashioned an alternative remedy that preserves the unlawful agency action pending reconsideration by the agency. By remanding the *ISP Remand Order* without also vacating it, the D.C. Circuit has extended a practice of questionable legality that this Court should review.

In fact, the question is not even settled within the D.C. Circuit itself. Individual judges within the D.C. Circuit have recognized the questionable legality of the "remand without vacatur" practice. In 1993, the D.C. Circuit identified certain criteria to consider in determining whether a decision remanded to a federal agency should also be vacated. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993). The following year in *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), two judges engaged in a vigorous debate whether the "shall set aside" language from section 702 of the APA meant that all agency actions remanded by a reviewing court required vacatur. The prevailing view was that a decision could be remanded but not vacated when the agency has not adequately explained its position in order for the court to determine the lawfulness of the agency action. *Id.* at 462 (Silberman, J., concurring). The minority view was that "[o]nce a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency's action." *Id.* 23 F.3d at 491 (Randolph, J. concurring). The D.C. Circuit subsequently stated that the issue raised in *Checkosky* had not yet been settled: "we do not reach the question raised and left undecided in *Checkosky* as to the validity of this precedent." *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1136 n.4 (D.C. Cir. 1995).

Even though the validity of remand without vacatur had not been decided, the D.C. Circuit has continued the practice. *See* Wu, Frank H., and Williams, Denisha S., "Remand Without

Reversal: An Unfortunate Habit," 30 Envtl. L. Rep. 10193 (2000). Nevertheless, at least one judge of the D.C. Circuit continues to believe that "remand without vacatur" violates the APA. In a recent dissenting opinion, Judge Sentelle endorsed the view of Judge Randolph in the *Checkosky* decision, and added to his argument: "*Heckler v. Chaney,* 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), among many other cases, establishes the proposition that courts are not to substitute their administrative judgments for those of the agency. . . . Therefore, when we hold that the conclusion [of the agency] heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting).

The crux of Judge Silberman's argument in *Checkosky* was that the APA is not necessarily violated when a reviewing court finds that an agency has not provided sufficient explanation for one of its actions. Judge Silberman contended that the court was unable to determine whether the agency had violated the APA because the agency had not explained itself adequately in order for the court to determine the basis for the agency action. *Checkosky*, 23 F.3d 452, 462 (D.C. Cir. 1994) (Silberman, J., concurring). Judge Silberman did not assert, however, that a reviewing court could find a violation of the APA and also remand an agency decision without also vacating it. Indeed, Judge Silberman recognized a distinction in those cases that warranted remand without vacatur from those that must be vacated: "In practice, the distinction—between a case where the reviewing court determines that the agency's explanation for its action is so crippled as to be unlawful and one where the court, unsure of the agency's reasoning, remands for a fuller explanation without expressing a view as to whether the agency's action is unlawful—is a matter of degree. But doctrinally the difference is enormous[.]" *Id.* at 464.

Yet the D.C. Circuit appeared to have no difficulty bridging this enormous doctrinal difference in *WorldCom* when the D.C. Circuit remanded the *ISP Remand Order* without also vacating it, even though the court determined that the FCC had erred as a matter of law by misreading the Telecom Act: "We agree with

petitioners that § 251(g) is not susceptible to the Commission's reading." *WorldCom* at 432. Further, "nothing in § 251(g) seems to invite the Commission's reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations." *Id.* at 433. Moreover, "§ 251(g) does not provide a basis for the Commission's action[.]" *Id.* at 434. Whatever the merits may be of remanding without vacatur under the circumstances of *Checkosky*, this case requires vacatur because the agency clearly erred as a matter of law.

III. Remand Without Vacatur Denies the Successful Litigant an Adequate Remedy

The Competitive Local Telephone Companies, in addition to numerous other competitors to the Regional Bell Operating Companies ("RBOC")and other incumbent local telephone companies, appealed the *ISP Remand Order* because the FCC grossly misinterpreted the provisions of the Telecom Act applicable to the dispute. These petitioners prevailed when the D.C. Circuit agreed that the FCC had erred. Nevertheless, the D.C. Circuit's decision to remand without vacating the *ISP Remand Order* effectively denies these successful appellants an adequate remedy.

The *ISP Remand Order* imposed a draconian and unnecessary "interim" compensation regime on the competitive industry. It is draconian because it literally closed off markets that were previously available to competitors, and capped the ability of competitive carriers to recover costs from the carriers that cause those costs. It is unnecessary because the justification that underlies it (calls to ISPs are not within carriers' section 251(b)(5) obligations) has been rejected. Although the FCC felt that the new interim compensation regime was necessary to prevent widespread "regulatory arbitrage" that it claimed existed prior to the *ISP Remand Order*, SBC Communications, Inc., the second-largest RBOC in the United States, serving more than 60 million access lines, never adopted the interim compensation regime after it became effective. *See* SBC Communications, Inc., Annual Report 2001, at 16 (Feb. 28, 2002) ("To date, none of our wireline subsidiaries have opted into the transition plan."),

http://www.sbc.com/investor_relations/company_reports_and_sec_filings/0,5931,136,00.html. Even though SBC prevailed at the FCC, SBC elected to maintain the status quo ante rather than comply with the requirements of the new interim compensation regime. SBC's conduct with respect to the new interim compensation regime proves that the new compensation regime was not necessary.

The prevailing appellants, including the Competitive Local Telephone Companies, are entitled to greater relief than that provided by the D.C. Circuit: "If a party has standing and prevails under its APA claim, it is entitled to a remedy under the statute, which normally will be a vacatur of the agency's order." *Andrx Pharmaceuticals, Inc. v. Biovail Corporation*, 276 F.3d 1368, 1379 (Fed. Cir. 2002); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). The Court should grant certiorari in order to review the action of the D.C. Circuit and provide the prevailing appellants with an adequate remedy.

IV. Remand Without Vacatur Constitutes an Evasion of the Requirements of *Bowen v. Georgetown University Hospital*

The Court should also grant the writ of certiorari because the "remand without vacatur" practice has mushroomed since the Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988). In *Georgetown*, the Court ruled that a decision from a federal agency following a remand from a federal court cannot be applied retroactively, without clear consent from Congress. The *Georgetown* decision thus laid bare a potential problem for administrative agencies: if their decisions were remanded and vacated following judicial review, there could be a gap in federal regulation until the agency issued a replacement rule in response to the remand instructions. This Court was presented with this argument by the federal agency in *Georgetown*: the Secretary of Health and Human Services asked to be allowed to issue "retroactive curative rulemaking" to cure the defect of a rule that had been invalidated by a court on review. *Id.* at 475. The Court declined to consider the issue because the applicable statutory scheme resolved the matter.. *Id.*

The D.C. Circuit has recognized that a decision not to vacate an agency order is a direct consequence of, and an attempt to avoid the implications of, the *Georgetown* decision. In *Allied-Signal,* the D.C. Circuit identified the criteria it considers when deciding whether to vacate a decision remanded to a federal agency. One of the criteria identified in *Allied-Signal* is the disruptive consequence of an interim change in federal regulation that may itself be changed when the agency issues its subsequent decision. *Id.* at 150-151. The D.C. Circuit specifically identified the consequences that the *Georgetown* decision would have on the Nuclear Regulatory Commission as sufficiently disruptive to warrant remand without vacatur. *Id.* at 151.

In *ICORE, Inc. v. FCC*, 985 F.2d 1075 (D.C. Cir. 1993), the D.C. Circuit addressed the relationship between remand without vacatur and the *Georgetown* decision. In support of an earlier decision remanding a decision to the FCC without vacating it, the D.C. Circuit rejected the argument that such conduct was prohibited by *Georgetown*. The D.C. Circuit recognized a distinction between "the use of retroactive rulemaking to cure a gap created by judicial vacatur of a rule" and "the judicial decision not to create such a gap." *Id.* at 1082. As long as the D.C. Circuit did not vacate the FCC decision, the reasoning goes, there is no problem with retroactive rulemaking that violated *Georgetown*.

The *ICORE* and *Allied-Signal* decisions represent an overt effort to evade the implications of *Georgetown*. Whether such an approach is acceptable, or even lawful, has not been addressed by this Court. Absent a more direct statement from this Court, the D.C. Circuit does not have the authority to ignore the "shall set aside" language of the APA when an agency errs as a matter of law. The practical implications of the *Georgetown* decision cannot supersede the plain language of the APA.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit as requested by Core Communications, Inc. .

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